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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1519

CLARENCE RAMEY, JAMES BLEDSOE, DAVID CURTIS MINTON, CHESTER FUGATE, HERSCHEL WOODWARD, ONZA COLLIER, DANNY MOORE, RONNIE FORTNER, JAMES HENSLEY, MURIEL GIBBONS, JAMES HAMILTON, AND MARION HOBBS,

Petitioners,

v.

PAUL T. HARBER, Individually, and as Sheriff of Lee County, Virginia; COUNTY OF LEE, VIRGINIA; AND BOARD OF SUPERVISORS OF LEE COUNTY, VIRGINIA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

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Petitioners,

v.

PAUL T. HARBER, Individually, and as Sheriff of Lee County, Virginia; COUNTY OF LEE, VIRGINIA; AND BOARD OF SUPERVISORS OF LEE COUNTY, VIRGINIA,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Ap-

peals for the Fourth Circuit in its cases Nos. 77-1927, 77-1928 and 78-1010 (December 15, 1978), the former two cases entitled *Ramey, et al.* v. *Harber,* and the latter case entitled *Ramey. et al.* v. *County of Lee, Virginia, et al.*

REPORT OF OPINIONS

The opinion of the Court of Appeals in the consolidated cases described above is reported at 589 F.2d 753 (4th Cir. 1978). A copy of that opinion is appended to this petition as Appendix A.

The opinion of the United States District Court for the Western District of Virginia in *Ramey* v. *Harber* is reported at 431 F. Supp. 657 (W.D. Va. 1977). A copy of that opinion is appended to this petition as Appendix C. The opinion of the District Court in *Ramey, et al.* v. *County of Lee, Virginia, et al.,* (No. 77-0089-B, November 7, 1977) is unreported. A copy of the order granting summary judgment to the defendants (respondents here) is appended to this petition as Appendix D.

JURISDICTION

This petition is filed pursuant to Rule 21 *et seq.* of the Rules of the Supreme Court of the United States.

(i) The judgment sought to be reviewed was entered on December 15, 1978 (Appendix A).

(ii) The order denying a petition for rehearing was entered on February 26, 1979 (Appendix B.).

(iii) The jursidiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First and Fourteenth Amendments, as interpreted in *Elrod* v. *Burns,* 427 U.S. 347 (1976), prohibit state officials from denying continued employment solely on the basis of political beliefs and associations to deputy sheriffs whose employment is made coterminous with their appointing sheriff's tenure of office by operation of state statute.

2. Whether, under the First and Fourteenth Amendments, state officials may refuse to continue to employ non-policymaking, non-confidential deputy sheriffs solely on the basis of their political beliefs and associations, and thereby avoid the rule of *Elrod* v. *Burns,* 427 U.S. 347 (1976), solely because there is a statute in effect that purports to make the employment of deputy sheriffs coterminous with the incumbent sheriff's tenure of office, when it is undisputed that only deputies who loyally perform public service but whose political beliefs and associations are deemed unacceptable to a newly elected sheriff are denied continued employment, while those deputies who previously quit their offices are given employment because of their acceptable political beliefs and associations.

3. Whether, in this case involving a state statute which purports to limit deputy sheriffs' employment to the appointing sheriff's tenure of office, and which respondents claim distinguishes this case from *Elrod* v. *Burns,* 427 U.S. 347 (1976), the rationale of *Elrod* can be ignored on the sole basis that the state action occurred prior to the date of this Court's decision in *Elrod,* when *Elrod* did not address the exact question presented in this case, and the separate opinion by

Mr. Justice Stewart, joined by Mr. Justice Blackmun, concurring in the judgment, which was necessary to this Court's majority, refused to go beyond the precise facts of *Elrod* (which did not involve the kind of statute at question in this case).

4. Whether the Court of Appeals erred in holding that this Court's decision in *Elrod* v. *Burns*, 427 U.S. 347 (1976), may be given no retroactive effect whatsoever in any case of unconstitutional termination of public employment which occurred prior to the date of this Court's decision in *Elrod*, but after certiorari was granted, where such holding is premised upon factual findings (a) that are unsupported by the record and are in conflict with the District Court's well supported findings of fact; (b) that do not purport to rest upon a conclusion that the District Court's findings of fact were clearly erroneous; and (c) that result in a reversal of the District Court without any finding of clear error or abuse of discretion by the District Court.

5. Whether it was clear error to deny a back pay award because of a belief that such an award would have to be paid exclusively from the sheriff's personal funds rather than from public funds, when the law is clearly at odds with such belief.

6. Whether it is permissible to deny a back pay award to the petitioners because of a belief that such an award would have to be paid exclusively from the sheriff's personal finances, without considering that public funds undoubtedly are subject to reach under the rule of this Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the First and Fourteenth Amendments to the Constitution, and of 42 U.S.C. § 1983 and VA. CODE § 15.1-48 are set forth in Appendix E to this petition.

STATEMENT OF THE CASE

Each of the petitioners was appointed either deputy sheriff or jailer by Curtis Flanary, Sheriff of Lee County, Virginia from 1972-1975, pursuant to a Virginia statute authorizing sheriffs to appoint deputies to discharge certain duties during the sheriff's continuance in office. Although the particular duties of each petitioner varied, as a group the petitioners carried out routine police functions, served process, acted as court bailiffs and operated and maintained the county jail. As both the District Court and Court of Appeals found, the petitioners were non-policymaking, non-confidential employees. The petitioners received the extensive, job-related training required by the state of all deputy sheriffs and jailers, requiring them to travel to educational institutions located at considerable distances from Lee County. The acquisition of this special training required a substantial public investment, both in actual outlay for tuition, transportation and other educational expenses, and also in the salaried time each petitioner was required to spend away from his usual duties during training. Obviously, completion of the training requirements required a personal investment by the petitioners as well.

Sheriff Flanary sought to retain his office in the general election held November 4, 1975, as the candidate of the Republican party. Among his opponents was Paul Harber, one of the respondents, who was the candidate of the Democratic Party. Each of the

petitioners actively supported Flanary's candidacy, while certain other Flanary deputies resigned and supported Harber. Paul Harber prevailed over Sheriff Flanary in the election, and assumed office on January 1, 1976.

Because of the training they had undergone, and their view that it was a disservice to incumbent deputies as well as to the public to terminate deputy sheriffs solely because of their political beliefs and associations, and because they believed their termination would be unconstitutional (this Court had granted review in *Elrod* v. *Burns*, 427 U.S. 347 (1976), on October 5, 1975), the petitioners inquired about the possibility of continued employment under Sheriff Harber on several occasions between the election and Harber's assumption of office. The earlier inquiries were made to Sheriff Harber by certain individual petitioners. One of the petitioners was told to file an application for the position he currently held or that his employment would not be continued. Another was invited to file an application, but was informed that it would not be acted upon favorably. Finally, on the last day of their employment, the petitioners met with Sheriff Harber as a group to inform him of their interest in continued employment, and to request that they be allowed to remain on the job. Sheriff Harber rebuffed the petitioners, at one point threatening them with violence. The petitioners peaceably left office when required to do so. Sheriff Harber thereafter appointed as his own deputies some of the petitioners' former colleagues who had supported Harber and had switched parties after abandoning their positions as deputies.

Upon advice of counsel, the petitioners immediately pursued administrative redress, without effect, but

deferred commencement of litigation pending the Court's disposition of *Elrod* v. *Burns, supra.* After announcement of the Court's decision in the *Elrod* case, the petitioners filed a civil action against Sheriff Harber in the United States District Court for the Western District of Virginia. The complaint was grounded upon 42 U.S.C.§ 1983, and jurisdiction was invoked under 28 U.S.C. § 1343. The petitioners alleged that Sheriff Harber's refusal to continue their employment deprived them of their freedoms of political belief and association, and thus violated their rights under the First and Fourteenth Amendments.

At trial the District Court empanelled an advisory jury which returned special verdicts to the effect that each of the petitioners had been satisfactorily performing the duties required of him in his non-policy-making, non-confidential position at the time of his termination from employment. The advisory jury further found to the effect that each petitioner had been denied continued employment solely on the ground of his political beliefs and affiliations, and that Sheriff Harber had not acted in good faith in denying continued employment to the petitioners.

The District Court adopted the special verdicts of the advisory jury as its own findings of fact, and held that Sheriff Harber had acted unlawfully in denying continued employment to the petitioners. The District Court considered that the constitutional violations in this case occurred prior to this Court's decision in *Elrod* v. *Burns, supra,* and, therefore, devised a remedial scheme which reinstated the petitioners in their former employment and granted them attorney's fees, but denied them back pay, as well as declaratory and other monetary relief. The District Court denied back pay because of a stated belief that such

an award would have to be satisfied out of Sheriff Harber's personal finances, despite the fact that he had been sued in his official capacity. Sheriff Harber filed notice of appeal, and the petitioners filed notice of cross-appeal. Pursuant to the order of the District Court, petitioners resumed their employment on June 1, 1976.

Soon after the District Court rendered the opinion described above, the petitioners filed an action in the District Court against the respondents other than Sheriff Harber. The second action was brought under the Fourteenth Amendment directly, with jurisdiction invoked under 28 U.S.C. § 1331. The allegations of the second complaint were similar to those of the first; the object of the suit was to obtain back pay free from the District Court's concern for imposing financial burden upon Sheriff Harber individually. Nevertheless, the District Court entered summary judgment for the respondents upon the same rationale stated in its earlier opinion. The petitioners duly filed notice of appeal. The first and second actions were consolidated before the Court of Appeals.

The Court of Appeals for the Fourth Circuit reversed the District Court's grant of relief to the petitioners, holding that this Court's ruling in *Elrod* v. *Burns, supra,* is not to be retroactively applied to grant any relief whatsoever for wrongful termination of employment which occurred prior to the date of decision in *Elrod.* The majority of the panel intimated that the express limitation of deputies' employment contained in the Virginia statute authorizing their appointment, as well as its own impression of the nature of the sheriff-deputy relationship and the antagonism it perceived to exist between Sheriff Harber

and the petitioners, were material distinctions from the facts before this Court in *Elrod.* Nevertheless, the majority of the panel chose to ignore the important question of whether the First and Fourteenth Amendments prohibit denial of continued employment (as well as discharge) solely for political reasons, and instead ruled only that if *Elrod* did apply to the facts of this case (a question it expressly failed to decide), no relief could be granted whatsoever because the state action in question took place prior to the date of this Court's decision. The majority of the panel rested this ruling upon its conclusion that retroactive application of *Elrod* would prove chaotic for local governments and would require the layoff of presently employed deputies, despite the fact that the petitioners had been reinstated for more than eighteen months, which indicates such hardships are not present in this case. The majority of the panel apparently did not consider the availability of such remedies as preferential hiring, which could not have a disruptive effect on local governments or their personnel. The majority of the panel ended its opinion by offering Sheriff Harber the opportunity to discharge all currently reinstated petitioners—an act otherwise clearly prohibited by *Elrod.*

Circuit Judge Hall filed an opinion concurring in the result which pointed out the majority's error in reaching the question of *Elrod's* retroactivity without first deciding whether the facts of this case present a separate question from the one decided in *Elrod.* Judge Hall emphasized four factors in distinguishing this case from *Elrod*: the limitation of employment in the Virginia statute; the active nature of the petitioners' campaigning for Flanary; his own impression

that, despite the hiring of former Flanary deputies who had supported Harber, the petitioners were not pressured to contribute to or join Harber's political party; and the small size of the Lee County Sheriff's Department.

Because the Court of Appeals decided that any relief would be inappropriate in this case, it had no occasion to consider whether the District Court's rationale in denying back pay ignored the holdings of this Court, the Fourth Circuit itself, and various other Circuit Courts of Appeals. The petitioners' request for rehearing and rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

There are four important reasons for granting a writ of certiorari to review the Court of Appeals' decision in these cases:

First, the Court of Appeals raised, but failed to resolve, the threshold question of whether the First and Fourteenth Amendments prohibit the denial of continued employment to (as well as the discharge of) non-policymaking, non-confidential public employees solely because of such employees' political beliefs and associations The resolution of this important question of Federal constitutional law, which has not been but should be settled by this Court, is necessary before the retroactivity question decided by the Court of Appeals ever arises.

Second, the Court of Appeals has decided the important question of whether all remedies, even nominal damages and purely prospective equitable relief, may be denied to those deprived of their constitutional rights whenever the relevant state action occurs

prior to the date of this Court's first pronouncement that the state action complained of violates the Constitution. The Court of Appeals has decided the question in a manner which can have major impact on the ability of courts to fully protect the constitutional rights of the citizenry. In deciding that even nominal damages and those remedies which operate prospectively must be denied in at least some instances, the Court of Appeals has decided a question of great import which has not been, but should be, settled by this Court.

Third, the Court of Appeals based its decision upon its own findings of fact, which are not supported by the record and are in conflict with the District Court's carefully considered findings. Based upon its own findings, the Court of Appeals reversed the judgment of the District Court without a finding of clear error or abuse of discretion. In ignoring well established standards of appellate review, the Court of Appeals is in conflict with the decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Fourth, in denying back pay to the petitioners, the courts below decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court, and in conflict with the decisions of the Courts of Appeals on the same matter.

I. The Question Of Whether The Constitution Prohibits Denial Of Continued Employment To Incumbent Non-Policymaking, Non-Confidential Public Employees Solely For Political Reasons Has Not Been, But Should Be, Settled By This Court.

This Court decided in *Elrod* v. *Burns*, 427 U.S. 347 (1976), that a non-policymaking, non-confidential government employee cannot be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. *Id.* at 375. (Opinion of Mr. Justice Stewart concurring in the judgment). This case presents a related question which this Court expressly did not decide in *Elrod:* whether a state official's refusal to continue the employment of his predecessor's deputies solely on the ground of their political beliefs and associations is similarly prohibited by the First and Fourteenth Amendments. The separate question arises in this case because the Virginia statute authorizing the appointment of deputies by certain officials provides that deputies serve only during their appointing official's continuance in office. Because of this statutory scheme, Sheriff Harber, instead of actually discharging the petitioners, had only to refuse to consider them for reappointment in his administration and allow the Virginia statute to take its toll.

Both the District Court and Court of Appeals recognized this distinction from the facts in *Elrod.* The District Court was of the opinion that the distinction was immaterial, at least to the result in this case. The Court of Appeals intimated that the distinction was in fact material, but inexplicably failed to decide the

novel question it perceived, disposing of the litigation by holding *Elrod* v. *Burns, supra,* entirely non-retroactive.

The petitioners contend that the question presented here is indeed a novel one, unaffected by the issue of retroactive application of *Elrod* v. *Burns.* The petitioners submit that the question should be settled by this Court to protect the important First Amendment rights involved, and also to save this Court's holding in *Elrod* from being undercut and ignored by any state which wishes to limit its employees' First Amendment protection through enactment of a statute similar to Virginia's. Of equal importance, the question presented in this case should be settled by this Court to eliminate the deterrence of public employees' exercise of First Amendment political freedoms which flows from the Court of Appeals' failure to define the constitutional protection available to those faced with denial of continued government employment.

A. The Constitution prohibits the denial of continued employment to incumbent non-policymaking, non-confidential public employees solely on the basis of their political beliefs and associations.

The principle that the First and Fourteenth Amendments prohibit state officials from denying continued employment to non-tenured public employees solely on the basis of such employees' political beliefs and associations has been uniformly recognized by this Court for nearly two decades in cases involving school teachers. *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The petitioner's

predicament here parallels in every material respect the teachers' situations in the Court's earlier cases. Neither the petitioners nor the teachers had an objective expectancy of continued employment beyond the fixed date on which their contracts or appointments expired. The petitioners and the teachers alike could have been denied continued employment for almost any reason, or for nor reason at all. However, in the same fashion that denial of contract renewal to teachers on the basis of their political beliefs and associations deprives them of constitutional rights, Sheriff Harber's refusal to reappoint the petitioners infringed their political freedom.

Even apart from this Court's earlier decisions, it is obvious that the same infringements of First Amendment rights which underlie this Court's decision in *Elrod* v. *Burns, supra,* are equally present here. The record in this case clearly demonstrates, contrary to the suggestion of the Court of Appeals, that Sheriff Harber's actions put pressure on the petitioners to switch political allegiances, albeit indirectly, by hiring their former colleagues who had switched parties. And the free functioning of the electoral process is just as surely inhibited by refusals to continue the employment of competent incumbent employees as it is by their discharge. In both instances, an employee is not free to follow the dictates of conscience unless he risks his livelihood to do so.

Similarly, governmental interests are no more compelling where a non-policymaking, non-confidential government employee is denied continued employment than where he is discharged. Sheriff Harber's interest in appointing new deputies to fill positions technically made vacant by operation of statute is

clearly no greater than Sheriff Elrod's interest in filling positions made vacant by the practice of discharging his predecessor's employees pursuant to age-old custom.

In sum, because the petitioners here assert no lesser constitutional interest in continued employment than did the deputies in *Elrod,* and because no greater counterveiling governmental interest is present, the balancing of such interests clearly favors these deputies also.

The important nature of the petitioners' claim to continued employment free from political manipulation is emphasized by the fact that unless their claim prevails, this Court's decision in *Elrod* v. *Burns, supra,* will be undermined to such an extent that it will lose all practical effect. Adoption of a contrary rule on these facts would authorize any state to simply enact a statute limiting the duration of public employees' service to their appointing official's term of office, thereby depriving public employees of the First Amendment freedoms secured in *Elrod.*Thus, a holding in this case contrary to that in *Elrod* would grant a license to the states to ignore *Elrod* altogether, and would impair not only the significant policy and constitutional law embodied in *Elrod,* but also the proper deference which the various states must afford Federal constitutional guarantees and the decisions of this Court. Moreover, the free exercise of First Amendment rights by public employees would certainly be chilled if this Court's decisions protecting those right proved so ephemeral.

B. This Court should settle the question at hand to relieve the impairment of First Amendment rights caused by the Court of Appeals' decision.

The Court of Appeals clearly recognized that the facts of this case present a separate and distinct question from the one decided by this Court in *Elrod* v. *Burns, supra.* Nevertheless, after intimating that an opposite result might be reached on the novel question presented here, the Court of Appeals proceeded to assume *arguendo* that this case in fact presented the identical question decided in *Elrod,* and thereupon rendered its decision asserting *Elrod's* nonretroactivity. By disposing of the case in such a fashion, the Court of Appeals has unquestionably cast doubt upon the ability of public employees to exercise political freedoms without risking their jobs. Unless this Court settles the question, thousands of public employees will certainly believe it more advisable to acquiesce in the demands for political support placed upon them by present or future employers than to adhere to conscience and risk their livelihood in the face of the Court of Appeals' muffled suggestion that adherence to conscience may cost them their jobs.[1]

This Court has time and again held unconstitutional those statutes, ordinances and regulations which impair the effective exercise of First Amendment rights. *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Coates* v. *City of Cincinnati,* 402 U.S. 611

[1] There has been no material change in the language of VA. CODE § 15.1-48 since this Court's announcement of its decision in *Elrod* v. *Burns, supra.* The provision presently affects the jobs of all deputies of every constitutional officer in Virginia (see Appendix E, p.).

(1971); *Gooding* v. *Wilson,* 405 U.S. 518 (1972). No less urgently does the stifling effect of the uncertainty fostered by the Court of Appeals' decision call for review by this Court.

II. The Question Of Whether Victims Of Constitutional Deprivation May Be Denied All Remedy Upon The Rationale Of Retroactivity Has Not Been, But Should Be, Settled By This Court.

The Court of Appeals, without deciding that this case falls within the ambit of *Elrod* v. *Burns, supra,* nevertheless reversed the District Court's grant of reinstatement and attorney's fees upon its view that *Elrod* may not be applied in any manner whatsoever to remedy terminations of employment which occurred prior to the *Elrod* decision. Assuming for argument's sake that this case does present the question of *Elrod's* retroactivity, the Court of Appeals' decision to deny the petitioners even purely prospective relief is an unprecedented misuse of an equitable doctrine to relieve wrongdoers of all the consequences of their misdeeds. Because the Court of Appeals' decision may well handicap the federal courts in fully and fairly securing constitutional guarantees to the people, and because the decision may curtail the free exercise of constitutional rights, this Court should grant review. As submitted in the later argument, the Court of Appeals' misapplication of this Court's retroactivity decisions and its disregard for the appropriate scope of appellate review also argue strongly for review by this Court.

The petitioners recognize the principle that new pronouncements of constitutional law may be restrict-

ed in their retroactive effect whenever their application to settled transactions will prove unduly disruptive or work substantial hardship. *Cipriano* v. *Houma*, 395 U.S. 701 (1969). Certainly, even a decision under the First Amendment may be restricted from disturbing transactions finalized before the date of that decision, if the District Court in its sound discretion deems such retroactive relief inequitable. *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*).

The Court of Appeals' decision, however, is unique in that it prohibits all relief, even prospectively focused relief which clearly does not disturb the *status quo*.[2] The Court of Appeals obviously misperceived the issue of *Elrod's* retroactivity as one touching upon the basic liability of state officials, rather than the appropriate remedy for concededly unconstitutional actions. This approach to the retroactive effect of constitutional decisions is a marked departure from this Court's earlier cases, which authorize the denial of only those forms of relief which, in the discretion of the District Court involved, unfairly upset past transactions settled in reliance upon statute or prior rulings of the courts. Here the Court of Appeals has vacated a grant of reinstatement which had been carried out more than eighteen months earlier, solely upon the ground that such reinstatement in future cases might cause hardship. And the Court of Appeals gave no consideration to forms of equitable relief which, if granted, would clearly not cause the hardships which that court feared.

Unless overturned, the Court of Appeals' harsh and inflexible use of retroactivity doctrine to deny all re-

[2] The Court of Appeals' decision left no room for even an award of nominal damages to the petitioners, despite the clear propriety of such basic relief under *Carey* v. *Piphus*, 435 U.S. 247 (1978).

lief to victims of official misconduct will serve as a deterrent to the courts in giving full effect to the Congressional policy of granting remedy for, and thereby deterring, deprivation of constitutional rights by state officials. The denial of all remedy to those exercising their rights in ways not yet explicitly sanctioned by this Court's decisions will restrict the willingness of citizens to engage in the full exercise of their rights. Perhaps more ominously, misuse of this Court's retroactivity decisions to insulate public officials from liability for abuses not yet specifically condemned by this Court will remove any deterrent to misdeeds that might be found in 42 U.S.C. § 1983.

III. The Court Of Appeals Misapplied This Court's Retroactivity Decisions And Exceeded The Proper Scope Of Appellate Review.

This Court has repeatedly identified the test governing the grant or denial of retroactive effect to new constitutional decisions as a balancing of the benefits to be gained by retroactive application of the new rule against the potential hardship which such application might cause. *Cipriano* v. *Houma*, *supra*; *Lemon* v. *Kurtzman*, (*Lemon II*), *supra*; *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977). The test is triggered only by a litigant's justified reliance upon a presumptively valid statute or a prior decision of the courts. This Court's decisions establish that the proper balance of the relevant interests is to be struck by the District Court acting within its sound discretion, and that appellate review is to be narrowly confined to the question of whether that discretion has been abused. *Lemon* v. *Kurtzman*, *supra*; *New York* v. *Cathedral Academy*, *supra*.

In a clear break with this Court's previous decisions [see *Roberts* v. *Russell*, 392 U.S. 293 (1968) and *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970)], the Court of Appeals found that the respondents' claimed reliance upon *Nunnery* v. *Barber*, 503 F.2d 1349 (4th Cir. 1974), *cert. denied* 420 U.S. 1005 (1975), was justifiable reliance sufficient to raise concern about the retroactivity of *Elrod* v. *Burns*, *supra*, despite the fact that *Elrod* was clearly foreshadowed, and despite the fact that the application to deputy sheriffs of *Nunnery* (which involved an alcoholic beverage official) had been expressly rejected in *Burns* v. *Elrod*, 509 F.2d 1133 (7th Cir. 1975). Based upon its conclusion that the respondents justifiably relied on *Nunnery*, the Court of Appeals proceeded to conclude that *Elrod's* purposes could not be appreciably advanced by retroactive application. By failing to initially decide whether the First and Fourteenth Amendments were violated, the Court of Appeals thus engaged in a balancing test without determining the strength of the petitioners' interest. It is precisely because the decision whether to grant or deny retroactive effect depends in large measure upon the nature of constitutional violation that this Court traditionally has decided the underlying constitutional question first. The Court of Appeals then assumed, wholly without support in the record, that retroactive application of *Elrod* would implicate thousands of patronage appointments in Virginia and the Fourth Circuit. In reaching this conclusion, the Court of Appeals rejected the District Court's cogent observation that the operation of the statute of limitations would ameliorate this problem. Based upon its conclusion that the reinstatement of hypothetical plaintiffs to the "thousands" of positions affected would disrupt the

functioning of government agencies and cost present employees their jobs, the Court of Appeals reversed the District Court without finding an abuse of discretion or clear error.

The Court of Appeals' provincial approach to the retroactivity of *Elrod* v. *Burns*, *supra*, unless reversed, will result in a patchwork application of *Elrod* in light of the Seventh Circuit's long line of cases protecting public employees' First Amendment rights. [See *Wren* v. *Jones*, 457 F.Supp. 234 (S. D. Ill. 1978]. Moreover, the Court of Appeals' holding that *Elrod* may not be retroactively applied is at odds with the retroactive application of *Elrod* in the First, Third and Fifth Circuits. *Rivera Morales* v. *Benitez de Rexach*, 541 F. 2d 882 (1st Cir. 1976); *Alfaro de Quevedo* v. *de Jesus Schuck*, 556 F. 2d 591 (1st Cir. 1977); *Rosenthal* v. *Rizzo*, 555 F.2d 390 (3rd Cir. 1977) *cert. denied* 434 U.S. 892 (1977); *Barton* v. *City of Eustis*, 415 F.Supp. 1355 (M.D. Fla. 1976). Although the issue of retroactivity is not discussed in any of the above cases, those courts' unequivocal application of *Elrod* to claims arising as early as 1973 raises a strong likelihood of future conflict among the various Courts of Appeals which only this Court could resolve.

The Court of Appeals' reversal of the District Court ignores this Court's holding in *New York* v. *Cathedral Academy*, *supra*, that the discretion of the District Court in determining whether to grant or deny retroactive effect is to be reversed only upon a finding of abuse of discretion. In that case this Court affirmed retroactive relief granted by the District Court to prohibit the same type of disbursements to religious schools which were saved from retroactive prohibition by the District Court in *Lemon* v. *Kurtzman* (*Lemon*

II), *supra*. In affirming opposite results in the two cases, this Court emphasized the breadth of the District Court's discretion in striking the relevant balance of interests. In this case, the Court of Appeals abandoned the proper scope of its review and impermissibly supplanted the District Court's well-founded exercise of discretion with its own factually unsupported assessment of the equities.

IV. The Denial Of Backpay Was Based Upon A Mistake Of Law And Exceeded The District Court's Narrow Discretion.

Backpay was denied to the petitioners because of the District Court's clearly erroneous belief that such an award, if granted, would have to be satisfied out of Sheriff Harber's personal finances. In the context of the factual finding that Sheriff Harber did not act in good faith, the denial of back pay was clearly an abuse of discretion. *Albemarle Paper Company* v. *Moody*, 422 U.S. 405 (1975). Even aside from the issue of Harber's bad faith, the District Court's belief that back pay would have to be paid by Sheriff Harber personally is clearly at odds with the overwhelming, if not unanimous, weight of authority. See *Burt* v. *Board of Trustees of Edgefield County School District*, 421 F.2d 1201 (4th Cir. 1975). Furthermore, this Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) renders the District Court's concern for the viability of Sheriff Harber's personal finances clearly erroneous.[3] Although

[3] The Court of Appeals did not rule upon the effect of *Monell* on *Ramey* v. *Harper*, nor upon the propriety of remanding *Ramey* v. *County of Lee, Virginia* (which was brought directly under the Fourteenth Amendment) with leave to amend in light of *Monell*.

the Court of Appeals did not address the back pay issue because of its view that all relief should be denied, the petitioners submit that this Court should correct the clear error underlying the denial of back pay as part of its review of the Court of Appeals' decision.

CONCLUSION

For the reasons stated herin, a writ of certiorari should be granted to review the decisions of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1927

Clarence Ramey, James Bledsoe, David Curtis Minton, Chester Fugate, Herschel Woodward, Onza Collier, Danny Moore, Ronnie Fortner, James Hensley, Muriel Gibbons, James Hamilton, Marion Hobbs,

Appellees,

v.

Paul T. Harber, individually and as Sheriff of Lee County,

Appellant,

and

Board of Supervisors of Lee County, W. Quentin Littrell, Individually and as member, Roy Lucas, Individually and as member, Ralph Robinette, Individually and as member, C. B. Waddell, Individually and as member, J. K. Newman, Individually and as member, Bill Jessee, Individually and as member, W. R. Hines, Individually and as member, A. T. Burchette, Individually and as member,

Defendants.

No. 77-1928

Clarence Ramey, James Bledsoe, David Curtis Minton, Chester Fugate, Herschel Woodward, Onza Collier, Danny Moore, Ronnie Fortner, James Hensley, Muriel Gibbons, James Hamilton, Marion Hobbs,

Appellants,

v.

Paul T. Harber, individually and as Sheriff of Lee County, Board of Supervisors of Lee County, W. Quentin Littrell, Individually and as member, Roy Lucas, Individually and as board member, Ralph Robinette, Individually and as member, C. B. Waddell, Individually and as member, J. K. Newman, Individually and as member, Bill Jessee, Individually and as member, W. R. Hines, Individually and as member, A. T. Burchette, Individually and as member,

Appellees.

No. 78-1010

Clarence Ramey; James Bledsoe; David Curtis Minton; Chester Fugate; Onza Collier; Danny Moore; James Hensley; Muriel Gibbons; James Hamilton,

Appellants,

v.

County of Lee Virginia; Board of Supervisors of Lee County, Virginia; W. Quentin Littrell; Roy Lucas; Ralph Robinette; C. B. Waddell; J. K. Newman; Bill Jessee; Jack Lee; A. T. Burchette; W. R. Hines,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge.

Argued October 4, 1978. Decided December 15, 1978.

Before HAYNSWORTH, Chief Judge, COWEN*, Senior Judge, and HALL, Circuit Judge.

Walton D. Morris, Jr. and Gary S. Bradshaw (Bradshaw and Morris, Ltd. on brief) for Appellants; Edgar Bacon, Larry Lewis, James P. Jones and Stephen M. Hodges (Penn, Stuart, Eskridge & Jones on brief) for Appellees.

COWEN, Senior Judge:

The appellants, hereinafter the deputies or plaintiffs, held positions as deputy sheriffs in Lee County, Virginia, until December 31, 1975. Deputy sheriffs in Lee County are non-confidential, non-policymaking public employees. The plaintiffs were appointed as deputy sheriffs by Curtis H. Flanary, a Republican who was elected sheriff in the general election of November 1971. His term was 4 years and he held that office from January 1, 1972 through December 31, 1975. Under the Virginia statute (section 15.1-48 of the Code of Virginia, 1950, as amended), the deputies

*Wilson Cowen, Senior Judge of the Court of Claims, sitting by designation.

of Virginia sheriffs hold office only during the term of the sheriff who appointed them. Pursuant to that statute and in accordance with the custom that had prevailed for decades in Lee County and many other small counties in Virginia, Mr. Flanary hired an entirely new set of deputies, retaining none of those who had served under his predecessor, a Democrat.

In the general election of November 1975, Mr. Flanary was opposed by the appellee, Paul T. Harber, hereinafter Sheriff Harber or defendant, who ran as a candidate of the Democratic party. Lee County has a history of spirited partisan political battles, and the two major parties have been almost equally strong over the years.

Sheriff Harber won the election, and a part of his plan to assume office on January 1, 1976, he issued application forms to all individuals who indicated an interest in the position of deputy sheriff. Only one of the plaintiffs made a formal application. All of the outgoing deputies had actively campaigned for the incumbent Flanary. Most of the plaintiffs had expressed an active interest in the status of their jobs. This resulted in some friction between the deputies and Sheriff-elect Harber, who informed them that their status was solely the concern of their principal, Sheriff Flanary, and that their continued employment was not a matter for Harber's comment. None of the plaintiffs was reappointed by Sheriff Harber. He refused to reappoint them solely because of their political beliefs and affiliations.

On June 28, 1976, 6 months after Sheriff Harber took office, the Supreme Court announced its decision in *Elrod* v. *Burns*, 427 U.S. 347 (1976), which held that the discharge of a non-confidential, non-policymaking employee under a patronage system was a violation of the Constitution. A few months later, in September 1976, the ten Republican deputies of former Sheriff Flanary filed this suit, alleging tht Sheriff Harber's course of conduct operated to deprive them of rights guaranteed under the First and Fourteenth Amendments to the Constitution. The original action was brought pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988. They sought injunctive and declaratory relief, permanent reinstatement in their former positions, back pay, attorneys' fees, and costs. The district court denied a preliminary injunction, but granted an expedited trail.

The district court dismissed the action as to the governing body of Lee County which had been joined in the suit against Sheriff Harber. However, in an opinion filed April 21, 1977,[1] the district court, relying on *Elrod* v. *Burns*, *supra*, held that the consitutional rights of the deputies had been violated and directed Sheriff Harber to reinstate and hire the deputies as his own, and to pay attorneys' fees of $15,000. The district court also found that Sheriff Harber had relied on existing law and custom in all of his actions and so declined to award the deputies backpay.

After an appeal had been noted by both parties, the deputies filed a second action aginst Lee County and its governing body, seeking payment from the County Treasury of back pay. The district court granted summary judgment, holding that the deputies had no claim against the county or its governing body.

In their appeal, the deputies claim they are entitled to an award of back pay, plus punitive damages, against Sheriff Harber, as well as relief against the County of Lee, its Board of Supervisors and members of that Board. The deputies also contend that the district court should have entered a declaratory judgment that section 15.1-48 of the Code of Virginia is unconstitutional.

We disagree with the district court's holding that *Elrod* v. *Burns*, *supra*, should be applied retroactively in this case, and reverse that part of the court's decision which

[1] Ramey v. *Harber*, 431 F. Supp. 657 (W.D. Va. 1977).

reinstated plaintiffs and awarded attorneys fees of $15,000 and taxable costs to them.

I. The applicability of *Elrod* v. *Burns*

In his first challenge to the district court's decision, Sheriff Harber makes a fairly persuasive argument that *Elrod* v. *Burns* has no application in this case on the ground that the facts upon which the Supreme Court based its decision are materially different from those presented here. In *Elrod* the deputies, who held indefinite terms of appointment, were *discharged* or threatened with discharge solely because "they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." The *Elrod* plurality also found that in order to hold their jobs, the deputies were required to "pledge their political allegiance to the Democratic party, work for the election of other candidates of the party, contribute a portion of their wages to the party or obtain the sponsorship of a member of the party, usually at the price of one of the first three alternatives." [427 U.S. at 355.]

The factual situation before us is dissimilar in several significant respects. Section 15.1-48 of the Code of Virginia (1950 as amended) pursuant to which plaintiffs had been appointed provides as follows:

> § 15.1-48. *Appointment of deputies; their powers; how removed.*—
>
> The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk or any circuit or city court may at the time he qualifies as provided in § 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law. The officer making any such appointment shall certify the same to the court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court. Any such deputy at the time his principal qualifies as provided in § 15.1-38 or thereafter, and before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers. The oath shall be filed with the clerk of the court in whose office the oath of his principal is filed and such clerk shall properly label and file all such oaths in his office for preservation. Any such deputy may be removed from office by his principal. Such deputy may also be removed by the court as provided by § 15.1-63.

As the district court found, this statute contains the only authority for the appointment of deputy sheriffs and under its provisions the terms of the deputies in Virginia end with the term of their principal. *Farmers' Bank of Southwest Virginia* v. *McGavock*, 119 Va. 510, 89 S.E. 949 (1916). In the event Sheriff Harber had wished to retain the plaintiffs as deputies, the district court correctly found that they would have had to requalify and to take and prescribe the appointment oath. All of the plaintiffs were familiar wih section 15.1-48 and knew that their appointments terminated with the expiration of Sheriff Flanary's term. They also were aware of the practice which had prevailed for many decades in Lee County and the other small counties under which a change in the political party controlling the sheriff's office is generally followed by a complete change of personnel in the deputy positions. The district court found that such a housecleaning "has long been considered permissible under the applicable Virginia law." Sheriff Harber made no demand on the plaintiffs that they change their political affiliations as a condition to reappointment. Both he and they were well aware of the fact that their jobs ended with Sheriff Flanary's term. Sheriff Harber refused to consider plaintiffs for reappointment, because they had actively opposed his election and because of his reliance on the Virginia statute and upon the practice which his predecessors had followed for a very long time.

In this connection, we take notice of the intimate relationship that undoubtedly exists between the sheriff and his deputies in a small county like Lee County, Virginia. The efficient operation of the sheriff's office in Lee County requires a high degree of mutual cooperation, confidence and support. None of these elements is likely to be present where the parties are bitter political antagonists. By contrast, the relationship between the sheriff and his deputies in the large Cook County, Illinois office is likely to be far more impersonal. There is no showing that the deputies in *Elrod* took an active part in the campaign against the sheriff. They were discharged because they had generally failed to support the Democratic candidates and the Democratic party. While their lack of party support could create some antipathy between them and the newly elected Democratic sheriff of Cook County, the existence of such antagonism is far from inevitable. However, in this case, the existence of deep antagonism—even animosity—was almost inevitable as a result of the active efforts which plaintiffs made to defeat Sheriff Harber. The record reflects the evidence of this animosity in the friction that arose between plaintiffs and Sheriff Harber when they expressed an interest in the status of their jobs before the sheriff assumed the duties of his office on January 1, 1976.

In *Elrod*, the Supreme Court split into a three-justice plurality, a two-justice concurrence, and a three-justice dissent. The factual distinctions discussed above raise a question as to the applicability of *Elrod* in view of the fact that the concurrence of Justices Stewart and Blackman in the plurality opinion explicitly limited the Court's holding to patronage dismissals.[2] As one commentator has observed, "the narrow position of the concurrence must be taken as the holding of the Court."[3]

[2] In his concurring opinion, Justice Steward stated: "The single substantive question involved in this case is whether a non-policymaking, non-confidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." [427 U.S. at 375.]

The district court's decision is supported by the broad sweep of th Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices. Although there is some doubt regarding the application of *Elrod* in this case, it is unecessary to decide that question in view of our conclusion on the issue of retroactivity. Therefore, for the purposes of disposing of this litigation, we assume without deciding that *Elrod* is applicable.

II. The retroactivity issue

As previously stated, the Supreme Court's decision in *Elrod* was handed down 6 months after Sheriff Harber had assumed the duties of his office and failed to reappoint any of the plaintiffs. In deciding whether this far-reaching decision of the Supreme Court should apply retrospectively in a civil case such as this, we look to the guidelines laid down by the Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

First, in order not to be applied retrospectively, the decision must establish "a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * ." [404 U.S. 106.] In his dissent in *Elrod*, Chief Justice Burger described the holding as follows:

> * * * the Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years. For all that time our system has wisely left

[3] Note, *Patronage and the First Amendment After Elrod* v. *Burns*, 78 Columbia L. Rev. 468 (1978).

> these matters to the States and, on the federal level, to the Congress. * * * [427 U.S. at 375.]

Justice Powell, in his dissent, characterized the majority ruling as follws:

> The Court holds uncontitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics. This decision is urged on us in the name of First Amendment rights, but in my view the judgment neither is constitutionally required nor serves the interest of a representative democracy. * * * [427 U.S. at 376-77]

These statements, standing alone, are sufficient for us to conclude that *Elrod* decided an issue of first impression whose resolution was not clearly foreshadowed. However, there is much more.

The district court in this case recognized that "*Elrod* did represent a new development of constitutional law in that a state's interest in its patronage system was found to be of insufficient magnitude so as to justify abridgement of First Amendment freedoms." [Jt. App. P. 94.]

Moreover, *Elrod* unquestionably overruled past precedent in this circuit. In *Nunnery* v. *Barber,* 503 F.2d 1349 (4th Cir. 1974), *cert. denied* 420 U.S. 1005 (1975), this court upheld a patronage discharge against an attack on constitutional grounds. After reviewing the history of judicial consideration of patronage, the court first determined that a patronage discharge case poses an issue which sould be resolved legislatively, not judicially, and that the legislative determination should not be overturned unless found to be palpably arbitrary or irrational. Alternatively, the court decided that an employee who voluntarily accepted a position knowing that it was dependent upon political activity waived the right to complain of a patronage discharge.

Finally, the court rejected the contention that the plaintiff's case was supported by previous decisions of the Supreme Court, stating:

> Nor do we find any support for plaintiff's contention in *Perry* v. *Sinderman* (1972), 408 U.S. 593, 93 S. Ct. 2694, 33 L. Ed.2d 750, even though she places great reliance on that authority. That case involved a college teacher, who had not been employed as a patronage employee and whose initial or continued employment was in no way dependent on political affiliation or activity. * * * [503 F.2d 1359.][4]

Understandably, the deputies argue that *Elrod* was clearly foreshadowed by *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Assuming *arguendo* that we could agree with this contention, we would still hold that *Elrod* should not be applied retroactively in this case, because "it was a clear break with the past." *Desist* v. *United States,* 394 U.S. 244, 248 (1969); *cf. CSC* v. *Letter Carriers,* 413 U.S. 548, 564 (1973); *United Public Workers* v. *Mitchell,* 330 U.S 75, 99 (1947).[5]

The second criterion set forth in *Chevron* requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [404 U.S. 106-07, quoting *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965).] We find this the most difficult of the factors to apply, because

---

[4] Plaintiffs correctly point out that this court distinguished *Nunnery* from *Illinois State Employees Union* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), on the ground that the legislative characterization of Nunnery's job as sensitive and nonroutine was not arbitrary and irrational. However, *Nunnery* emphatically held that the *Lewis* decision was unprecedented and contrary to the general rule followed by both state and federal courts.

[5] See the discussion of the these cases in *Elrod* v. *Burns,* 427 U.S. 347, 386-87 (1976) (Powell, J., dissenting).

we are not persuaded that a showing has been made that retroactive application of *Elrod* in this case will further or retard the operation of the new rule. In civil cases, which present different considerations from those in criminal cases, the courts have often focused on such factors as reliance and the need for stability.[6] We think this is the teaching of *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), the most recent expression of the Supreme Court on the question.

We are faced then with a situation where we must use the balancing process to determine whether the benefits to be gained by applying *Elrod* retroactively to this case are outweighed by considerations of reliance, hardship, injustice, and the impact on the administration of justice in the Fourth Circuit.

The district court found that Sheriff Harber undoubtedly acted under color of state law, relied on the applicable Virginia statute, and followed the longstanding practice under which newly elected sheriffs in Lee and other Virginia counties selected their deputies on a patronage basis. The court also recognized that Sheriff Harber's action was in accord with the applicable law in the Fourth Circuit as expressed in *Nunnery* v. *Barber, supra.* Nevertheless, the district court concluded that none of the classic elements of reliance interest are present in this case.

First, with respect to the sheriff's reliance on *Nunnery* v. *Barber,* the district court held that the conflict between that case and *Illinois State Employees Union* v. *Lewis, supra,* was sufficient to diminish the "potential for a reliance interest." We cannot agree.

In *Nunnery* v. *Barber, supra,* this court found that *Illinois State Employees Union* was "without direct precedent" and a departure from the accepted rule which had been laid down in many cases cited in the opinion. [503 F.2d 1352, and n.6.] As this court also noted, several commentators had remarked tht *Illinois State Employees Union* was the first case which granted constitutional protection of political association to patronage employees. *Id.* Under these circumstances, the sheriff's reliance on the *Nunnery* case was reasonable.

[6] Note, *Retroactivity and Civil Suits: Linkletter Modified,* 42 Fordham L. Rev. 653, 659 (1974). *See also* Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 41 Virginia L. Rev. 201, 235-37 (1965).

The district court also concluded that the defendant's reliance was unjustified because (1) he did not act in reliance upon a decision of the Supreme Court; (2) *Elrod* did not overrule an existing Supreme Court precedent, and (3) in view of the Supreme Court's holdings in *Perry* v. *Sindermann, supra,* and *Keyishian* v. *Board of Regents, supra,* Sheriff Harber should reasonably have suspected that he could not act with impunity. We have already pointed out that in *Nunnery,* we expressly considered *Perry* v. *Sindermann* and decided it did not support the plaintiff's position, because it involved a teacher who had not been employed on a patronage basis and whose continued employment was not dependent upon political affiliation or activity.

If this court could not forsee the decision in *Elrod,* we certainly cannot agree that Sheriff Harber should have anticipated that his actions would be condemned by this new development in constitutional law.

The district court also dismissed defendant's reliance on the Virginia statute and upon the long-existing patronage practice on the grounds (1) that the statute is relatively innocuous, authorizing no more than an exercise of discretion, and (2) that opportunities for the exercise of political patronage have been largely whittled away by the growth of civil service systems. We think a sufficient reason for rejecting this view may be found in the following statement from *Lemon* v. *Kurtzman, supra,* at 199:

> * * * statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. * * *

The final element for determining retroactivity. as stated in *Chevron*, calls for weighing the inequity that may be imposed as a result of retro-application, for, as the Court said, "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [402 U.S. at 106-07, quoting *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969).] We are convinced that both hardship and disruptive instability will result from the restrospective application of *Elrod*. Although we do not have any statistics showing the number of employees who would be affected, we may safely assume that there are thousands of patronage appointments in Virginia and in this circuit which will be subject to attack if *Elrod* is given retroactive application. If former employees whose jobs expired under the terms of state law are reinstated, new employees who were hired in reliance on existing law and custom followed for many years will lose their jobs. Several cases are now pending in the district court below,[7] brought by plaintiffs who seek recovery on the ground that they lost their positions through the operation of the patronage system which existed before *Elrod* was decided. A large turnover of employees in state and county offices would undoubtedly create confusion and seriously disrupt the efficient functioning of these offices. Such expectations and probabilities prompted the court in *Litwhiler* v. *Hidlay*, 429 F. Supp. 984 (M.D. Pa. 1977), to hold that *Elrod* should not be applied retrospectively. The court there reviewed the factors discussed in *Chevron* and based its holding pri-

[7] The number of these cases may be quite large, so the plaintiffs' observation that the statute of limitations has now run for pre-*Elrod* dismissals is unpersuasive.

marily on the chaos which the court felt would result from a retroactive application, declaring that such action "would ignite a chain reaction of claims whose magnitude exceeds reasonable assessment." [429 F. Supp. at 193.] Except for the decision of the district court below, *Litwhiler* is the only case we have found in which a court has expressly considered and ruled on the retroactivity of *Elrod*.[8]

Finally, we think the hardship that may be imposed upon many employees who would lose their jobs by the retroactive application of *Elrod* is substantially greater than the hardship that will be suffered by plaintiffs if we decide that *Elrod* should be applied prospectively only. The hardship caused them by this decision is no greater than that sustained by the deputies they replaced in January 1972. Plaintiffs were well aware of the state law and the patronage practice that had long prevailed and realized when they were appointed by Sheriff Flanary that they could expect to lose their jobs if he lost the election. We agree with defendant that their reinstatement was a windfall—a result which we think should not be provided by a holding of retroactivity.

We think the factors which we have discussed tilt the balance in favor of the prospective application of *Elrod*. It follows that the portion of the district court's judgment and order of April 1, 1977, which ordered plaintiffs' reinstatement and awarded attorneys' fees and costs is hereby set aside. Sheriff Harber may, at his discretion, replace

[8] Claiming that *Litwhiler* is of doubtful validity, plaintiffs rely on *Rosenthal* v. *Rizzo*, 555 F.2d 390 (3d Cir. 1977); *Alfaro de Quevedo* v. *De Jesus Shuck*, 556 F.2d 591 (1st Cir. 1977); *Rivera Morales* v. *Benitez de Rexach*, 541 F.2s 882 (1st Cir. 1976), and *Barton* v. *City of Eustis*, 415 F. Supp. 1355 (M.D. Fla. 1976). An examination of these cases reveals that the issue of retroactivity was not discussed and apparently was never raised in any of them. Consequently, we cannot consider them as authoritative precedents on the retroactivity issue.

any of the plaintiffs who were reinstated by the district court's order, provided that written notice of the proposed action shall be given to each of the affected deputies at least 30 days before the effective date of his termination.

AFFIRMED IN PART AND REVERSED IN PART.

HALL, Circuit Judge, concurring:

I concur in the result reached by the majority, but I think that we cannot fairly decide the issue of *Elrod's* retroactivity without first determining that the issue is squarely presented by the facts. If this case is not controlled by the rule of *Elrod*—and I submit that it is not, as the majority itself initimates—than we have no occasion to consider whether *Elrod* should be accorded retroactive effect.

Because I fear that the majority opinion may be read to imply that *Elrod* would apply prospectively on facts similar to those in this case, I write to express my view that *Elrod* has no application here. The majority discusses a number of pertinent factual considerations: (1) the deputies took office pursuant to a statute which fixed their terms and were simply not rehired after the terms expired; (2) the deputies actively campaigned against Sheriff Harber (which refutes any inference that they lost their jobs because of passive political beliefs or affiliation); (3) the deputies were not pressured to contribute time or money to Harber's party or to obtain the sponsorship of a member of that party; and (4) the nature and size of the Lee County Sheriff's Office necessitates mutual confidence and co-operation which is unlikely to exist where members of the office have actively opposed each other in a bitter election campaign. These facts are completely dissimilar to those in *Elrod*, and mandate the conclusion that Sheriff Harber was not constitutionally constrained to re-hire the deputies whose terms had expired.

I would deny relief on this ground, and save the issue of *Elrod's* retroactivity for another day.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1927
Filed Feb. 26, 1979

Clarence Ramey, et al. — *Appellees,*
versus
Paul T. Harber, etc. — *Appellant,*
and
Board of Supervisors of Lee County, et al — *Defendants.*

No. 77-1928

Clarence Ramey, et al, — *Appellants,*
versus
Paul T. Harber, etc., et al, — *Appellees.*

No. 78-1010

Clarence Ramey, et al, — *Appellants,*
versus
County of Lee, Virginia, et al, — *Appellees.*

ORDER

Upon consideration of the petition of Clarence Ramey, et al, for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Haynsworth, Judge Cowen, and Judge Hall.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX C

IN THE

United States District Court for the Western District of Virginia

ABINGDON DIVISION

Civil Action No. 76-0848

CLARENCE RAMEY, ET AL

Plaintiffs

v.

PAUL T. HARBER,

Defendant

Memorandum Opinion, Findings of Fact and Conclusions of Law

By: James C. Turk,
Chief District Judge

Filed Apr. 22, 1977

This action is predicated on 42 U.S.C. § 1983 *et seq* and came to be tried by this court. Perceiving this case to involve certain factual issues of great import, the court empaneled an advisory jury to assist the court in the consideration of such questions, pursuant to Rule 39(c) of the Federal Rules of Civil Procedure. Following trial of this case, conducted from January 26, 1977 through January 28, 1977, the advisory jury responded to special verdict form questions with answers totally favorable to plaintiffs. By way of a motion for judgment notwithstanding the verdict, defendant would now have the court reject the advisory jury's findings. Throughout the development of

this case, defendant has contended that the resolution of the issues turns solely on an interpretation of Virginia law. Defendant further contends that even if the jury's findings are adopted, judgment against the defendant cannot be effected since the case involves application of newly developed constitutional law which should properly be applied prospectively. Inasmuch as all post-trail arguments have been heard and all post-trial breifs filed, the court now proceeds to consider defendant's contentions and to make apporproate findings of fact and conclusions of law.

Statement of the Facts Not at Issue

Up until December 31, 1975, plaintiffs in this action held positions as deputy sheriffs in Lee County, Virginia. All of the plaintiffs were appointed as deputy sheriffs by Curtis H. Flanary who was sheriff of Lee County from January 1, 1972 through December 31, 1975. Mr. Flanary was elected Sheriff in the general election held in November of 1971. Apparently, upon assuming office, Mr. Flanary hired a totally new set of deputies, retaining none of the deputies who served under his predecessor, a Democrat. Mr. Flanary stood for re-election to the Office of Sheriff in the general election held in November of 1975. He was opposed by the defendant, Paul T. Harber, who ran as the candidate of the Democratic Party. Mr. Harber proved to be the successful candidate and, accordingly, commenced preparations for the assumption of office at 12:01 a.m. on January 1, 1976.

Apparently, Sheriff-elect Harber proceeded to issue formal application forms to all individuals who indicated an interest in the position of deputy sheriff. It is uncontroverted that only one of the named plaintiffs made a formal application for employment as a deputy under Sheriff Harber.[1] Out of the more than fifty applicants, Sheriff Harber

[1] As discussed *infra*, the appointments of Sheriff Flanary's deputies ended with the term of their principal.

selected ten candidates to serve as deputies. None of the plaintiffs were numbered among the successful applicants. However, the record reveals that during the period between the election and the time of Sheriff Harber's assumption of office, most of the plaintiffs expressed an active interest in the status of their jobs.[2] Indeed, such interest apparently resulted in the development of a degree of friction between some of the deputies and Sheriff-elect Harber. On the night of December 31, 1975, Sheriff-elect Harber and his staff of deputies went to the Lee County Sheriff's Office so as to prepare to commence execution of the duties of Sheriff at 12:01 a.m. on January 1, 1976. Sheriff-elect Harber and his staff were confronted by many of Sheriff Flanary's deputies who again requested information on their status. As in previous discussions, Sheriff-elect Harber told the Flanary deputies, in essence, that their status was solely the concern of their principal, Sheriff Flanary, and that their continued employment was not a matter for his (Harber's) comments. Sheriff-elect Harber and his deputies began execution of the duties of the office of Sheriff on January 1, 1976.

It is uncontroverted that all of the plaintiffs campaigned actively in Sheriff Curtis Flanary's bid for re-election. At the time of trial, it became apparent that the motivation for such political activity varied from plaintiff to plaintiff. Several of the plaintiffs attributed their political work to a long-standing affiliation with the Lee County Republican Party. Other plaintiffs noted that they were interested in maintaining Sheriff Flanary in office so that they might be assured of keeping their own jobs. Indeed, Sheriff Flan-

[2] In this context, it is perhaps relevant to note that the plaintiffs apparently felt that they had expressed their interest in continued employment to Sheriff-elect Harber in the period between the election and the end of the year. At trial, it became evident that most of the plaintiffs felt that making formal application for deputy sheriff would have been either futile or unnecessary since they already held the positions.

ary testified that he expected all his deputies to work for him in the campaign. Sheriff Flanary further observed that he felt that this was only fair, since all his predecessors had been able to rely on similar support. In this context, it becomes clear that this case involves the operation of the Virginia variant of the political substructure commonly known as the patronage system. To place the matter in clearer focus, the court notes that in many Virginia counties, a change in the political party controlling the Sheriff's office is often accompanied by a complete change of personnel in the deputy positions.[3] As discussed *infra*, such a "house cleaning" has long been considered permissible under the applicable Virginia law concerning appointment of Sheriff's deputies.

Subsequent to the assumption of office by Sheriff Harber, plaintiffs attempted to secure reinstatement to their previous positions of deputy sheriff. Initially, they filed grievances pursuant to § 15.1 - 7.1 of the Code of Virginia (1950), as amended. However, as currently constituted, the grievance mechanism established under § 15.1 - 7.1 is inapplicable to deputies of constitutional officers such as the Sheriff. However, on September 27, 1976, plaintiffs commenced this court action, alleging that defendant's course of conduct operated so as to deprive plaintiffs of certain rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States. Jurisdiction of this court is pursuant to 28 U.S.C. § 1343 and is uncontested. The action was originally brought pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 1988. In the complaint as eventually developed before this court, plaintiffs specifically allege that their employment as deputy sheriffs was discontinued solely because of their political affiliations and that the conduct of defendant operated so as to restrict and infringe upon plaintiffs exercise of their free-

[3] However, in larger Sheriff's offices, it is not uncommon for deputies of the outgoing administration to be retained.

dom of political belief and association.[4] In their initial complaint, plaintiffs sought injunctive, monetary, and declaratory relief. The court denied plaintiffs' motion for preliminary injuctive relief by order dated November 19, 1976, finding that since all plaintiffs had already become separated from service with the Sheriff's office, no showing of irreparable injury had been made. The court also based this denial on the fact that an expedited trial date had already been granted. Plaintiffs subsequently appealed the court's denial of preliminary injunctive relief to the Court of Appeals for the Fourth Circuit, where such appeal is pending to date.

Relevance of *Elrod* v. *Burns*

In the development and trial of the issues of this case, both sides recognized the interplay of the recent United States Supreme Court decision in *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 647 (1976). Since the circumstances of *Elrod* are somewhat similar to those involved in the instant case, the court deems it relevant to summarize the holdings in *Elrod*, prior to a discussion of the factual issues and defendant's contentions in this case.

Elrod involved the actual discharge and threat of discharge allegedly suffered by several employees of the office of Sheriff in Cook County, Illinois, following a change of party in the position of Sheriff. The affected employees alleged that the conduct of Sheriff Elrod operated so as to violate rights secured under the First Amendment. The case reached the United States Supreme Court on Sheriff Elrod's appeal from an order of the Court of Appeals for

[4] Prior to the trial of this case, the court granted plaintiffs' motion to dismiss, as party defendants, the members of the Lee County Board of Supervisors who had originally been named both individually and in their official capacities. The court also granted plaintiffs' motion to dismiss so much of their complaint as related to allegations of denial of procedural due process and equal protection.

the Seventh Circuit which overturned the judgment of the District Court denying preliminary injunctive relief.[5] In a divided majority opinion, the Supreme Court affirmed the judgment of the Seventh Circuit. Clearly, *Elrod* involved the operation of the Illinois system of political patronage.

Three of the Justices who comprised the majority in *Elrod* recognized a need to evaluate the propriety of the political patronage system in light of the safeguards of First Amendment freedoms established by such cases as *Keyishian* v. *Board of Regents*, 385 U.S. 587, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) and *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33L.Ed.2d 570 (1972). Mr. Justice Brennan, joined by Mr. Justice White and Mr. Justice Marshall, made the evaluation and found, *inter alia*, as follows:

> "Patronage practice falls squarely within the prohibitions of *Keyishian* and *Perry*. Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association and dismissal only penalizes its exercise." 427 U.S. at 359.

Finding no compelling reasons for restraint of such freedoms, Mr. Justice Brennan deemed the patronage system to be constitutionally invalid.

Mr. Justice Stewart and Mr. Justice Blackmun concurred in the judgment of the other majority members. However, Mr. Justice Stewart, joined by Mr. Justice Blackmun, specifically found the circumstances of *Elrod* to be too narrow in scope so as to permit a definitive characterization of the constitutional status of all patron-

[5] Unlike the instant case, several of the plaintiffs had not yet been separated from service in *Elrod*, thus creating a potential for irreparable harm. The opinion of the Seventh Circuit appears under *Burns* v. *Elrod*, 509 F.2d 1133 (7th Cir., 1975).

age systems. Nevertheless, Mr. Justice Stewart agreed with the plurality that the affected employees in *Elrod* had possibly suffered a denial of First Amendment freedoms. Relying on established precedent, Mr. Justice Stewart concluded as follows:

> "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing on the sole ground of his political beliefs. I agree with the plurality that he cannot. See *Perry* v. *Sinderman*, 408 U.S. 593, 597-598." 427 U.S. at 375.

Mr. Chief Justice Burger, Mr. Justice Powell, and Mr. Justice Rehnquist joined the dissent. Relying on the significance of the past role that patronage practices have played in the American democratic process, Mr. Justice Powell concluded, *inter alia*, that the various States, acting in sound discretion, should be able to provide for emloyment in certain public offices, conditioned on partisan political affiliation. Mr. Justice Powell further reasoned that the states interests in maintaining such practices are so significant as to justify an abridgement of First Amendment guarantees.

Mr. Justice Stevens took no part in the consideration and decision in *Elrod*.

Application of *Elrod* v. *Burns* to the Formulation of the Issues in the Instant Case

Given the division of the majority in *Elrod*, this court must recognize that a general assessment of the validity of the Virginia patronage system would necessarily involve a speculative trek through largely uncharted waters.[6]However, *Elrod* clearly represents a new develop-

[6] As discussed infra, the instant case permits a somewhat different variation of patronage practice in that the affected employees were not reappointed, rather than dismissd.

ment in constitutional law. Stated briefly, *Elrod* must stand for the proposition that the operation of a patronage system cannot be deemed so crucial to the conduct of the democratic system so as to permit a relaxation of certain First Amendment safeguards, as delineated by earlier case law. While Mr. Justice Stewart and Mr. Justice Blackmun were unwilling to review the ramifications of all patronage systems, there can be no doubt that *all five* majority members in *Elrod* found that the application of the Illinois system of patronage could be violative of First Amendment freedoms, given certain circumstances. The "lowest common denominator" in the majority opinion in *Elrod* must be considered to be that embodied in Mr. Justice Stewart's paraphrase of the rule of *Perry*: a nonpolicymaking, nonconfidential governmental employee cannot be discharged from a job that he is satisfactorily performing upon the sole grounds of his political beliefs. 427 U.S. at 375. Implicit in this "common denominator" is the recognition that the patronage dismissal of a policy-making, confidential subordinate would , by necessity, involve broader considerations than mere political affiliation.[7]

In light of the above analysis, it becomes clear that the loss of employment through the operation of a patronage system must be evaluated on an individual basis. In order to conform to the "lowest common denominator", it is not enought to determine that the loss of employment occurred through what a finder of fact might perceive to be a patronage system. Rather, it must be determined (1) whether the affected employee served in a nonpolicymaking and

[7] The inclusion of the criteria of "nonpolicymaking and nonconfidential" represents a logical evolution from *Perry* and *Keyishian* and was apparently necessitated by the varying circumstances of patronage dismissals. The plurality opinion in *Elrod* employs similar terminology. 427 U.S. at 367-368. In this context, it is again clear that all five majority members in *Elrod* recognized a need to curb *some* patronage dismissals in favor of First Amendment rights.

nonconfidential capacity, (2) whether there is reason to believe that the affected employee was not sufficiently performing his duties so as to justify separation from employment, and (3) whether the affected employee was denied continued employment solely because of his political affiliations. While plaintiffs contended that their burden of proof under such a test was greater than that contemplated by the plurality in *Elrod*, the court presented this case to the advisory jury in the form of a special verdict with questions designed to reach each of these factual issues. The court listed each of the eleven parties plaintiff in such a manner so that the jury might decide each factual issue as it related to each of the plaintiffs. In each instance and for each individual, the advisory jury rendered a verdict totally favorable to all plaintiffs.[8]

Defendant's Motion for Judgment N.O.V.

Throughout the development and trial of this case, defendant has maintained that the factual situation in *Elrod* is clearly distinguishable from the circumstances of the instant case. Defendant urges that the operation of the Virginia statute, governing appointment of deputy sheriffs, is such as to render plaintiffs' claim of First Amendment infringement totally frivolous. Section 15.1-48 of the Code of Virginia (1950), as amended, provides the only authority for the appointment of deputy sheriffs. *Board of Supervisors* v. *Lucas*, 142 Va. 84, 91, 128 S.E. 574, 576 (1925). The section provides, in pertinent part, as follows:

> "*Appointment of deputies; their powers; how removed.*—
>
> The . . . sheriff of any county or city, . . . may at the time he qualifies as provided in § 15.1-38 or thereafter

[8] The court also asked the advisory jury to determine whether defendant exercised good faith in his selection of deputies. The jury found that he had not. As discussed *infra*, the question was designed to assist the court in fashioning any equitable remedy that might prove to be appropriate.

> appoint one or more deputies, who may discharge any of the official duties of their principal during this continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law. . . . The officer making any such appointment shall certify the same to the court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court. Any such deputy at the time his principal qualifies as provided in § 15.1-38 or thereafter, and before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers. . . . Any such deputy may be removed from office by his principal. . . ."

It is clear that under the provisions of § 15.1-48, the terms of the deputies of constitutional officers in Virginia end with the term of their principal. *Farmers' Bank of Southwest Virginia* v. *McGavock*, 119 Va. 510, 89 S.E. 949 (1916). Thus, even had Sheriff Harber decided to retain one of Sheriff Flanary's deputies, that deputy would have had to requalify as well as take and prescribe the appointment oath.[9] In his motion for judgment n.o.v., defendant has reaffirmed his reliance on § 15.1-48 in that he would have the court reject the advisory jury's findings.

Defendant makes several contentions relating to § 15.1-48. Two of these contentions are interrelated and make the stronger argument. Defendant correctly observes that *Elrod* was concerned with patronage *dismissal*. In the instant case, the actual separation from employment occurred through the operation of law. Consequently, defendant reasons that plaintiffs could not have possibly suffered a loss of employment due to the exercise of rights guaranteed under the First Amendment. In a slightly different context, defendant urges that § 15.1-48 completely wipes the

[9] At trial, it became evident that plaintiffs understood the mandates of § 15.1-48 in that they realized that their formal roles ended with the expiration of Sheriff Flanary's term.

slate clean as regards an incoming Sheriff's choice of deputies. Given the wide discretion vested in the Sheriff by virute of § 15.1-48, defendant insists that there was no duty to continue the emloyment of the deputies of the defeated principal.[10]

The court finds defendant's position to be without merit. The mere fact that plaintiffs had no vested right to reappointment cannot be dispositive of their claim of constitutional infringement. On several occasions, the United States Supreme Court has ruled that a nontenured school teacher could not be denied contract renewal solely because of the teacher's exercise of rights protected under the First and Fourteenth Amendments. E.g. *Shelton* v. *Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d (1960); *Keyishian* v. *Board of Regents, supra; Perry* v. *Sinderman, supra*. Indeed, it would seem that the potential for abuse of First Amendment freedoms is accentuated when the decision as to reappointment is totally within the discretion of the appointing authority. See *Shelton* v. *Tucker, supra*, 364 U.S. at 486. Thus, the fact that plaintiffs had no right to expect reappointment is insufficient, in itself, to preclude a First Amendment action.[11]

[10] Traditionally, principal officeholders in Virginia have been deemed to enjoy great discretion in personnel decisions. See, e.g., *Hoge* v. *Trigg*, 4 Munf. (18 Va.) 150 (1814).

[11] It has also been held that an employee who has received his job through operation of a patronage system could be viewed to be precluded from raising objection to a loss of his job through operation of the same system. *Nunnery* v. *Barber*, 503 F.2d 1349, 1359 (4th Cir., 1974), cert. denied 420 U.S. 1005, 95 S.Ct. 1448, 43 L.Ed. 2d. 763 (1975); *Alomar* v. *Dwyer*, 447 F.2d 482, 483-383 (2d Cir., 1971), cert. denied, 404 U.S. 1020, 92 S.Ct. 683, 30 L.Ed.2d 667 (1972). However, inasmuch as the United States Supreme Court has now applied the rationale of *Perry* to the context of political patronage, such an implied waiver is obviously not relevant. See *Nunnery* v. *Barber, supra*, at 1361 (dissenting opinion of Circuit Judge Butzner).

As concluded above, a clear majority of the Court in *Elrod* v. *Burns, supra*, found that a State's interest in preserving its patronage system was not so great as to permit a relaxation of First Amendment safeguards. Consequently, the court is unable to perceive any difference in the test to be applied when the lack of expectancy interest arises out of the operation of contract renewal and when, as here, the lack of expectancy interest arises through the operation of statute.

It is clear that in First Amendment actions, the *reason* for dismissal or failure to reappoint presents the crucial question. Defendant contends that § 15.1-48 must be read so as to permit an appointing principal in Virginia to employ unbridled discretion in making his choice of deputies. Defendant maintains that since the Flanary deputies were automatically terminated at midnight on December 31, 1975, he owed them no further consideration. However, the court must find that, under the law, such unbridled discretion simply does not exist. In *Perry* v. *Sinderman, supra*, the Supreme Court characterized the state of the law as follows:

> "For at least a quarter of a century, this court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on the basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." 408 U.S. at 597.

Stated briefly, while Sheriff Harber could have refused to consider continued employment for the Flanary deputies for numerous and valid reasons, he could not refuse consideration for the wrong reasons. It was not enough for Sheriff Harber to redirect plaintiffs' queries concerning their job status to their "lame duck" principal. Furthermore, it was not enough for the defendant to blindly rely

on the patronage practices established over the course of decades, even centuries, if those practices had degraded to no more than purely political manipulations. Finally, while the Commonwealth of Viringia may have wisely chosen to vest broad discretion in its various constitutional officers as to matters of personnel appointment and discharge, this court is unaware of any authority supportive of the proposition that such discretion may take precedence over the paramount freedoms of speech and association.

The last contention raised by defendant under § 15.1-48 concerns the nature of the duties of deputy sheriffs in Virginia. Defendant argues that § 15.1-48 serves to vest in the deputy sheriffs powers coextensive with those of the Sheriff.[12] Consequently, defendant urges that deputy sheriffs are policymakers by denfinition and thus excluded from the rule of *Elrod* v. *Burns, supra*. There can be no doubt that § 15.1-48 grants deputies of constitutional officers the authority to perform numerous "official" and perfunctory duties incumbent to the office. *Farmers' Bank of the Southwest* v. *McGavock, supra*, at 517, 89 S.E. at 951. If a deputy sheriff could not make a valid service of court papers, he would be of little value to his principal. In this sense, ". . . a sheriff and his deputy are one." *Board of Supervisors* v. *Lucas, supra*, at 91, 128 S.E. at 576. However, there can be no doubt that the Sheriff is designated, both under the Virginia statutory scheme and in the eyes of the public, as the official in charge. Indeed, § 15.1-48 specifically recognizes that some of the Sheriff's duties may be expressly forbidden to deputies by law. The deputies are no more than appointees and clearly can be held answerable to their principal. Of course, some Sheriffs may choose to delegate great discretion in the policymak-

[12] Section 15.1-48 provides that deputies ". . . may discharge any of the *official* duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law." (Emphasis added.)

ing realm of certain of their deputies. For example, Sheriff Flanary could have allowed his chief deputy, who supervised the office at night, to have exercised some role in policy formulation. If so, the chief deputy would have no grounds for redress under *Elrod* v. *Burns, supra*. It is clear that the question turns on the circumstances of individual cases in individual Sheriff's offices. Consequently, the court concludes that the issue of the status of plaintiffs as policymakers presents factual questions which are properly before the court for resolution.

In summary, the court must hold that defendant's reliance on § 15.1-48 is misplaced. Section 15.1-48 provides an incoming Sheriff the opportunity to exercise some discretion in personnel selections, reappointments, and terminations. However, there is no provision for the exercise of absolute discretion. Indeed, the law requires otherwise. Obviously, § 15.1-48 need not be read so as to permit a constitutionally prohibited abuse of discretion. Moreover, the automatic termination provisions of § 15.1-48 do not serve as a bar to a First Amendment action. Finally, the mere fact that deputy sheriffs are authorized to act in the name of their principal does not necessitate a finding, as a matter of law, that such deputies are invariably policymakers within their respective offices. Inasmuch as it relates to arguments made under § 15.1-48, defendant's motion for rejection of the advisory jury's verdict is denied.

Section 15.1-48 is best viewed as essentially mechanical in nature, barren of any far-reaching policy judgments on political configuration. Specifically, the court is unaware of any authority supportive of the proposition that § 15.1-48 was *intended* to embody or lend support to the Virginia system of political patronage. While the operation of § 15.1-48 has undoubtedly shaped the development of Virginia patronge practices, the relationship is not symbiotic in nature. Section 15.1-48 has meaning and validity

far removed from the purely political context.[13] Indeed, the court perceives that the automatic termination provisions could be employed by a newly elected Sheriff or, for that matter, a reelected incumbent, so as to provide a simple and expedient means of discontinuing incompetent deputies. While some observers might still regard such a coup as an exercise of "patronage", the test of the constitutional validity of the practice must be in the substance, not in the characterization. All that smacks of patronage cannot necessarily be deemed evil.[14] The facts and circumstances must be viewed in the individual context. Accordingly, the court finds that this case embodies factual issues which are properly submitted to an advisory jury and which are now properly before the court for resolution. Defendant's various motions for favorable judgment, premised on § 15.1-48, have been properly denied.

Factual Determinations

The advisory jury found that plaintiffs had met their burden of proof as to each of the requisite elements in the test as described above. The court now proceeds to evaluate the evidence and make appropriate findings of fact.

The evidence clearly reveals that each of the named plaintiffs was performing in a satisfactory manner at all times prior to the cessation of employment on December

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[13] In their original complaint, plaintiff would have this court declare § 15.1-48 unconstitutional, inasmuch as the section permits patronage practices. Obviously, such a declaration in inappropriate if for no other reason that the fact that the court has found the statute to be subject to a constitutionally acceptable interpretation. See, e.g., *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347-348, 56 S.Ct. 466, 80 L.Ed.2d 1101 (1936).

[14] In this sense, the court has again received guidance from the concurring opinion of Mr. Justice Stewart in *Elrod* v. *Burns, supra* at 374 and from the dissenting opinion of Circuit Judge Butzner in *Nunnry* v. *Barber, supra*, at 1360-1362.

31, 1975. Indeed, there is no evidence to the contrary and defendant does not dispute the point. The greater weight of the evidence also establishes that each of the named plaintiffs, including Chief Deputy Onza Collier, was performing in a nonpolicymaking and nonconfidential capacity while serving as a deputy sheriff under Sheriff Flanary.[15] The testimony of the deputies revealed that each individual had clearly assigned duties and responsibilities. Several of the "road deputies" were exclusively assigned to specific areas of the county. However, in each case, their freedom of action was limited by the mandates of Sheriff Flanary. At the most, the only discretion exercised by the deputies was in purely ministerial matters, such as when to arrest a drunk or when to drive the drunk home. The decision that such discretion might be exercised by the deputies was solely that of Sheriff Flanary. While Chief Deputy Collier was in charge of the office in the absence of the Sheriff, the testimony of Flanary and Collier revealed that Collier would leave any policy questions that might arise until the return of the Sheriff. The evidence further reveals that Sheriff Flanary did not confide in his deputies in matters of general administrative operation and policy formulation. Clearly, the preponderance of the

[15] Numerous commentators have recognized that the term "policymaker" presents an elusive factual question. See, e.g., *Nunnery* v. *Barber supra; Illinois State Employees Council 34, etc.* v. *Lewis*, 473 F.2d 561 (7th Cir., 1972), cert. denied 410 U.S. 928 and 943, 93 S.Ct. 1364, 1370, 35 L.Ed.2d 590, 609 (1973). Obviously, the term may assume different connotations in different forms of employment. For purposes of the present case, the court has considered a policymaker to be one who controls or exercises a role in the decision making process as to the goals and general operating procedures of the office. For example, the decision to make a specific arrest would be a nonpolicymaking act while a decision to concentrate on certain types of crime would be that of a policymaker. The court has also assumed that one may become a policymaker specifically, by delegation of authority, or tacitly, by gradual ascendancy.

evidence establishes that the deputies merely implemented policy set forth by their principal.

Finally, the court considers whether the defendant refused to consider the plaintiffs for reappointment solely because of plaintiffs' political beliefs and affiliations. In this context, it is relevant to note what is and what is not at issue. Much of the evidence adduced at trial related to Sheriff Harber's criteria for the selection of new deputies. At best, Sheriff Harber's testimony as to these criteria is generously described as confused. Indeed, it is the court's opinion that it was defendant's testimony on this matter that led to the advisory jury's finding of "bad faith" on the part of Sheriff Harber in his selection process.[16] Sheriff Harber may or may not have selected his new deputies on the basis of their political affiliation. The court need not make a finding on this point. The revelant inquiry concerns whether the *old* deputies were excluded from consideration solely because of their political stance. All parties must agree that if Sheriff Harber did not exclude the plaintiffs for purely political reasons, it would have represented a radical departure from past practice, as described by numerous witnesses. Moreover, defendant's responses to plaintiffs queries were to take their questions to their defeated principal. The implication was clear: he (Harber) had been elected through the support of his party—Flanary had been defeated, and the sorry state of affairs suffered by Flanary's employees was not to be placed at Flanary's door. In such circumstances, merit, training, and experience were to be extraneous considerations. The court must find that the preponderence of the evidence, and the inferences reasonably drawn therefrom, establishes that plaintiffs were refused consideration for reappointment solely because of their political beliefs and affiliations.

Before leaving the factual circumstances, the court deems it relevant to comment on the impact of the opera-

[16] See N.8, *supra*.

tion of the Virginia patronage system, as manifested in the instant case. In the plurality opinion of *Elrod* v. *Burns, supra*, Mr. Justice Brennan found that the reasons commonly advanced in support of patronage practices are not so persuasive as to suggest a legitimate grounds for the curbing of First Amendment freedoms. 427 U.S. at 364-373. Indeed, Mr. Justice Brennan noted that "... if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same." Id., at 370. The court finds that the same considerations apply to the Virginia patronage practices, at least as exhibited in the instant case. Moreover, it appears to this court that the patronage practices applied in this case are even more repugnant to sound governmental administration than the system practiced in Illinois. The court is unable to conceive of any possible justification for a *sweeping* change of deputies in the small Lee County Sheriff's Office.[17] Most of the old deputies had undergone extensive and expensive training. Indeed, it would seem that a radical change of staffs would impair the efficiency and conduct of ongoing criminal investigations. Under the old system, an incoming Sheriff must labor under great pressure, given the expections of many members of this party and his campaign workers. The morale of lame duck deputies must necessarily plummet, since they must expect separation from employment regardless of the quality of their past services. Finally, the efficiency of the Sheriff's Office during an election period is certainly impaired when the various deputies know that their jobs may well depend on how much time they are able to devote to the incumbent party's campaign.

In summary, the operation of the Virginia system of patronage, as manifested in the instant case, can only be

[17] In Illinois, old deputies could apparently retain their positions if they could command or solicit support from leaders of the incoming party. *Elrod* v. *Burns, supra* at 351.

viewed as dysfunctional, stifling, and counter-productive. As it affected plaintiffs in this case, the court must decide that the system is also constitutionally invalid. Moreover, the court is unable to perceive any indication, either in law or fact, that Virginia has a greater state interest in maintaining its patronage system than does the State of Illinois.

Retroactivity of *Elrod* v. *Burns*

Predictably, the parties are at great odds as to the proper disposition to be made in this case. Defendant would have this court declare *Elrod* v. *Burns, supra* to be nonretroactive inasmuch as it applies to prohibited acts which took place prior to the announcement of the decision on June 28, 1976. Defendant contends that the traditional acceptance of patronage practice, coupled with certain earlier court decisions, operated so as to create a "reliance interest" sufficient to prohibit restrospective application. Plaintiffs argue the *Elrod* is obviously intended to be applied retrospectively since the decision is premised on the strictures of such well known and frequently cited cases as *Perry* v. *Sinderman, supra* and *Keyishian* v. *Board of Regents, supra.*

As Mr. Justice Clark noted in *Linkletter* v. *Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d. 601 (1965), the doctrine of nonretroactivity is a modern innovation, generally not accepted as common law. It would seem that the growth of the doctrine has paralleled the developing notion of law as a dynamic institution. In any case, the doctrine is now applied to certain situations involving changes in constitutional interpretation. Most frequently applied in criminal matters, the doctrine has been invoked to protect state actions taken under a constitutional principle that is premised on subsequently rejected decisional law. E.g., *Linkletter* v. *Walker, supra,* refusing retrospective application of *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6

L.Ed.2d 1081 (1961), which overruled *Wolf* v. *Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); Tehan* v. *Shott*, 382 U.S. 406, 86 S.Ct., 459, 15 L.Ed.2d 453 (1966), refusing retrospective application of *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 14, 53 L.Ed. 97 (1908). The doctrine has been deemed applicable to civil cases, *Linkletter* v. *Walker supra*, 381 U.S., at 627, and has been so applied e.g. *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). On occasion, the doctrine has been invoked to protect action taken prior to the declaration of a statute's unconstitutionality. E.g., *Lemon* v. *Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973).

A review of the relevant cases reveals that the Supreme Court has considered three factors to be relevant in the determination of the proper time-frame for the application of new law. The Supreme Court will inquire into the prior history of the rule in question; its purpose, impact, and best means of effecting its objective; and the degree and nature of reliance engendered by the old rule. See *Linkletter* v. *Walker, supra*. As noted above, defendant has placed primary emphasis on the reliance interest created through the tradition of political patronage.

Defendant is undoubtedly correct in observing that patronage practice has played a role in Virginia politics for many, many years. Opportunistically, defendant reads *Elrod* v. *Burns, supra* to reveal that such learned personages as Mr. Chief Justice Burger, Mr. Justice Powell, and Mr. Justice Rehnquist could not perceive that the mandates of *Perry* v. *Sinderman, supra* and *Keyishian* v. *Board of Regents, supra* were to be extended beyond the sanctity of the patronage system. How then, defendant reasons, could he, a county sheriff-elect and ex-coal miner, know that the patronage system, employed by his predecessors, was foreclosed to him? Moreover, defendant notes that the applicable law in the Fourth Circuit in the fall of 1975 was that expressed in *Nunnery* v. *Barber*, 503 F.2d 1349 (4th Cir.,

1974), cert. denied 420 U.S. 1005, 95 S.Ct. 1448, 43 L.Ed.2d 763 (1975), in which it was found *inter alia*, that correction of patronage abuse was a matter of legislative concern. Thus, defendant would have this court conclude that he is protected through a reliance interest.

While the court considers defendant's arguments relevant for certain purposes as described *infra*, the court is unable to conclude that the factors assigned by defendant are sufficient for a finding of a reliance interest as contemplated in *Linkletter* v. *Walker, supra* and its progeny. Defendant was not acting in reliance on a decision of the United States Supreme Court. While defendant was undoubtedly acting under color of state law, the statute in question is relatively innocuous in that it authorizes no more than an exercise of some discretion. Clearly, neither of the classic elements of reliance interest are present in the instant case; *Elrod* v. *Burns, supra* did not overrule an existing Supreme Court precedent nor did it declare any statute to be unconstitutional. The court recognizes that under the criteria for nonretroactivity described in *Linkletter* v. *Walker, supra*, other relevant circumstances must be examined. While the age of patronage tradition operates in the defendant's favor, a survey of the recent history of the practice reveals that the strength of the tradition has by no means remained absolute. Opportunities for the exercise of patronage have largely been whittled away by the growth of civil service systems and merit plans, both in Virginia and nationwide. Given such manifestations of disfavor and given such clear limitation on the use of discretion in personnel matters as expressed in *Keyishian* and *Perry*, the court must find that defendant should have reasonably suspected that he could not act with impunity.

As to defendants reliance on the decision in *Nunnery* v. *Barber, supra*, there is support for the proposition that conflicts among courts as to a rule of law is sufficient to diminish the potential for a reliance interest. Cf. *Roberts* v. *Russell*, 392 U.S. 293, 295, 88 S.Ct. 1921, 20 L.Ed.2d

1100 (1968); *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295, 90 S.Ct. 1033, 25 L.Ed.2d 312 (1970). While the court in *Nunnery* was able to distinguish *Illinois State Employees Union Council 34, etc.* v. *Lewis*, 473 F.2d 561 (7th Cir., 1972) cert. denied 410 U.S. 928 and 943, 93 S.Ct. 1364, 1370 35 L.Ed.2d 590, 609 (1973) on the facts, there could be no doubt that a conflict existed among the various circuits when the Court of Appeals for the Seventh Circuit rendered its decision in *Burns* v. *Elrod, supra*. Since Burns v. *Elrod*, specifically concerned deputy sheriffs, the significance of the case should have been obvious to anyone who was familiar with *Nunnery* v. *Barber, supra*.

Given the circumstances that patronage has been generally on the wane in recent years and given the fact that *Elrod* v. *Burns, supra* clearly represents an expansion of earlier case law, the court must decide that the principles of *Elrod* should properly be given retroactive application, within the confines of the applicable statute of limitations for actions predicated on 42 U.S.C. § 1983. As noted above, *Elrod* did represent a new development in constitutional law in that a state's interest in its patronage system was found to be of insufficient magnitude so as to justify abridgement of First Amendment freedoms. However, defendant had no particular reason to believe otherwise. While there was case law to indicate that patronage abuses might be of legislature concern, such holdings were by no means uniform. Furthermore, inasmuch as *Elrod* stands for the expansion of principles governing protection of First Amendment freedoms, the court finds that the purpose of *Elrod* will be best served by retrospective application.

In considering the question of retroactive application, the court has remained cognizant of two recent Circuit Court decisions which specifically concern the impact of *Elrod* v. *Burns, supra*. In *Nunnery* v. *Barber*, _____ F.2d _____, Civil Action Number 73-2502 (4th Cir., March 18,

1977) (*Nunnery* II), plaintiff had applied for leave of the Court of Appeals for the Fourth Circuit to allow the District Court to reconsider her case, pursuant to Fed. R. Civ. P. 60(b), in light of *Elrod*.[18] Nunnery had previously exhausted her appeal of the adverse decision of the District Court. In *Nunnery* II, the Fourth Circuit held that a change in a rule of law, occurring after judgment becomes final, is an insufficient ground for reopening for the judgment under Rule 60(b). Moreover, the Fourth Circuit further noted in *Nunnery* II that ". . . *Elrod* contains no indication or suggestion that the Supreme Court intended its decision to have retroactive effect. . . ." (Slip Opinion at 5). However, this court is not convinced that the doctrine of nonretroactivity has progressed to the extent that the Supreme Court's silence as to the question will create a presumption of prospective design. Indeed, in the vast majority of Supreme Court cases providing for nonretroactivity, the Court has found it necessary to decide the question in a case considered subsequent to the decision that is to be applied nonretroactively. It is this court's understanding that, as a general rule, the law in effect at the time of a court's decision must be applied, absent considerations of manifest injustice or clear and binding intent to the contrary. Cf. *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Moreover, it is clear that the Court of Appeals for the First Circuit had absolutely no difficulty with a retroactive application of *Elrod* in the recent case of *Rivera*

[18] The Court of Appeals for the Fourth Circuit had previously affirmed the District Court's decision upholding the patronage dismissal of plaintiff. *Nunnery* v. *Barber, supra* (Nunnery I). As noted above, it was the opinion of the Fourth Circuit that patronage abuses are matters of legislative concern. Furthermore, citing *Alomar* v. *Dwyer*, 447 F.2d 482 (2nd Cir., 1971), cert. denied 404 U.S. 1020, 92 S.Ct. 683, 30 L.Ed.2d 667 (1972), the Fourth Circuit found that plaintiff implicitly waived her right to complain of her patronage dismissal when she accepted her employment under the same practice.

Morales v. *Benitez de Rexach*, 541 F.2d 882 (1st Cir. 1976). While the District Court had found for plaintiff on grounds of denial of substantive due process, the First Circuit determined that the case involved a patronage dismissal that was prohibited by *Elrod*. Even though the dismissal took place approximately three years prior to the decision in *Elrod*, the First Circuit apparently found it unnecessary to even consider the question of retroactivity of the decision.

The court has considered one final and crucial factor in its determination as to the retroactive application of *Elrod*. The court perceives the problem of retroactivity in a case such as this to involve a balancing of interests of the respective parties. Cf. *Lemon* v. *Kurtzman*, *supra*. If retroactivity were to be denied, it could be said that a manifest in justice would be done to plaintiffs. There can be no doubt that plaintiffs had decided to contest their loss of employment, even before the Supreme Court announced its decision in *Elrod*. Given the Supreme Court's resolution of that matter, it is at least arguable that plaintiffs could have eventually prevailed on the bases of *Perry* and *Keyishian*, even in the absence of *Elrod*. On the other hand, defendant would undoubtedly suffer a manifest injustice if plaintiffs are accorded the full measure of relief for which they pray. While defendant obviously acted with less than full knowledge of all the relevant law and circumstances, his actions were consistent with the highly political context within which he operated. A pawn of political inertia, defendant would suffer greatly if he were made to bear the full extent of plaintiffs' losses. Faced with the unhappy task of balancing the relative injustices to be suffered by the parties, the court takes solace in the fact that the primary relief to be accorded in this case falls within the province of equity. Given such a circumstance, the prospect of retroactive application can be viewed as less onerous. Armed with the potential for shaping its equitable remedies in accordance with the needs of the parties and the realities of the case, the court must conclude that

retroactive application will best serve to protect the interests of all parties and to advance the purpose of *Elrod*.[19]

Plaintiffs' Remedies

In their original complaint, plaintiffs sought injunctive, monetary, and declaratory relief. For reasons stated above, the court has determined that declaratory relief is inappropriate. However, inasmuch as the court has found that defendant unlawfully refused to consider plaintiffs for reappointment as deputy sheriffs, the court must determine that plaintiffs are entitled to reinstatement to their former positions. The court recognizes that immediate reinstatment would work a hardship in the management of the small Lee County Sheriff's Office. Consequently, the court will order and decree that reinstatement shall be effected as of 12:01 A.M. on June 1, 1977. Prior to that date, the defendant shall afford each of the named plaintiffs the opportunity to requalify, as well as take and prescribe the appropriate oath, pursuant to § 15.1-48 of the Code of Virginia (1950), as amended. Upon reinstatement, each plaintiff shall enjoy at lest the same renumeration, privileges, and benefits as he did at the time of his separation from employment.

Plaintiffs also seek compensation for their lost wages. Reimbursement of back wages fall within plaintiffs' equitable remedy of reinstatement. See, e.g., *Jinks* v. *Mays*, 464 F.2d 1223, 1226 (5th Cir., 1972). However, it does not follow that back wages should be reimbursed to prevailing plaintiffs as a matter of course. *Jinks* v. *Mays*, *supra* at 1226; *Wright* v. *Southwest Alabama Gas District*, 376

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[19] The broad discretionary authority of the court in shaping equitable decrees is well established. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Brown* v. *Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed.2d 1083 (1955); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1940).

F.Supp. 780, 782 (M.D. Ala., 1974). To hold defendant solely responsible for the back wages of all the plaintiffs would be both unrealistic and unfair. The court has found that while defendant was acting in ignorance of relevant case law and recent circumstances surrounding patronage practices, defendant was merely responding to the expectations of those to whom he felt he owed a duty. While it is impossible to determine that defendant acted in good faith, it is also impossible to conclude that he acted in bad faith.[20] The plaintiffs themselves fully expected that their requests for consideration by Sheriff Harber would be futile. In the abstract, it was possible that trained legal authorities could have foreseen the expansion of *Keyishian* and *Perry* that was eventually embodied in *Elrod*. However, such considerations were far removed from the highly volatile political environment of Lee County, Virginia, into which Sheriff Harber was thrust as a relative novice. A court sitting in equity must take cognizance of the realities of the situation. Exercising discretion on the basis of what are perceived to be sound equitable principles, the court must decide that plaintiffs shall not be reimbursed for lost wages.

Plaintiffs also seek an award of monetary damages. However, the court finds that no proof of actual damages has been made. Moreover, given the circumstances of this case, the court finds that an award of punitive, exemplary, or nominal damages is inappropriate.

Finally, plaintiffs pray for recovery of attorney's fees. Under 42 U.S.C. § 1983, an allowance of attorney's fees is within the discretion of the court. Considering all relevant circumstances of this case, the court determines that in order to do justice between the parties, plaintiffs will be

[20] As noted above, the court has determined that the advisory jury's findings of bad faith on the part of defendant in his selection process was made in response to questions not at issue. See N. 9, *supra*.

allowed reasonable attorney's fees in the sum of Fifteen Thousand Dollars ($15,000).

Conclusion

The foregoing shall constitute the court's findings of fact and conclusions of law. An appropriate judgment and order will enter this day.

DATED: This 21st day of April, 1977

/s/ James C. Turk
Chief United States District Judge

APPENDIX D

IN THE

United States District Court for the Western District of Virginia

ABINGDON DIVISION

Civil Action No. 77-0089-B

CLARENCE RAMEY, ET AL.,
Plaintiffs

v.

COUNTY OF LEE, ET AL.,
Defendants.

Filed Nov. 8, 1977

This action came to be heard on the defendants' motion to dismiss, upon the defendants' motion for summary judgment, and upon the arguments of counsel.

The Court, having considered all issues before it, makes the following findings:

1. The Court has jurisdiction over all the defendants under 28 U.S.C. § 1331 and the Fourteenth Amendment to the United States Constitution;

2. The complaint states a cause of action upon which relief might be granted;

3. There is no genuine issue as to any material fact, and the defendant is entitled to judgment as a matter of law,

for the reasons set forth in this Court's opinion in *Ramey* v. *Harber*, 431 F. Supp. 657 (W.D. Va. 1977), *appeal docketed*, No. 77-1927 (4th Cir. July 19, 1977).

The Court therefore ORDERS that the defendants' motion to dismiss is denied and overruled, but that summary judgment be entered for the defendants pursuant to Federal Rule of Civil Procedure 56(c).

Enter this 7th day of November, 1977.

/s/ James C. Turk
Chief United States District Judge

SEEN AND OBJECTED TO:

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Big Stone Gap, Virginia 24219

By /s/ Walton D. Morris,Jr.
Counsel for the
Plaintiffs

SEEN:

/s/ Larry Lewis
Counsel for the Defendants

APPENDIX E

U.S. CONST. amend. I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV §1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursidiction the equal protection of the laws.

42 U.S.C. § 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

VA. CODE § 15.1-48
The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court may at the time he qualifies as provided in § 15.1-38 or therafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance

in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law. The sheriff of any county or city making an appointment of a deputy under the provisions of this section may review the record of such deputy as furnished by the Federal Bureau of Investigation prior to certification to the appropriate court as provided hereunder. The officer making any such appointment shall certify the same to the court in the clerk's office of which the oath of the principal of such deputy is filed and a record thereof shall be entered in the order book of such court. Any such deputy at the time his principal qualifies as provided in § 15.1-38 or thereafter, and before entering upon the duties of his office, shall take and prescribe the oath now provided for county officers. The oath shall be filed with the clerk of the court in whose office the oath of his principal is filed and such clerk shall properly label and file all such oaths in his office for preservation. Any such deputy may be removed from office by his principal. Such deputy may also be removed by the court as provided by § 15.1-63.

Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1519

CLARENCE RAMEY, JAMES BLEDSOE, DAVID CURTIS MINTON, CHESTER FUGATE, HERSCHEL WOODWARD, ONZA COLLIER, DANNY MOORE, RONNIE FORTNER, JAMES HENSLEY, MURIEL GIBBONS, JAMES HAMILTON, AND MARION HOBBS,

Petitioners,

v.

PAUL T. HARBER, Individually, and as Sheriff of Lee County, Virginia; COUNTY OF LEE, VIRGINIA; AND BOARD OF SUPERVISORS OF LEE COUNTY, VIRGINIA,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1519

CLARENCE RAMEY, JAMES BLEDSOE, DAVID CURTIS MINTON, CHESTER FUGATE, HERSCHEL WOODWARD, ONZA COLLIER, DANNY MOORE, RONNIE FORTNER, JAMES HENSLEY, MURIEL GIBBONS, JAMES HAMILTON, AND MARION HOBBS,

Petitioners,

v.

PAUL T. HARBER, Individually, and as Sheriff of Lee County, Virginia; COUNTY OF LEE, VIRGINIA; AND BOARD OF SUPERVISORS OF LEE COUNTY, VIRGINIA,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

The question presented by this case is whether the Court of Appeals correctly held that this Court's decision in *Elrod* v. *Burns,* 427 U.S. 347 (1976), should

not be given retroactive effect, where the Court of Appeals applied the guidelines of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), in determining the retroactivity issue. The respondents submit that the Court of Appeals did not reject the District Court's findings of fact, but to the contrary, based its holding on such findings.

STATEMENT OF THE CASE

This is a political patronage case, arising from *Elrod* v. *Burns*, 427 U.S. 347 (1976), in which a purality of this Court decided that a "nonpolicy making, nonconfidential government employee [cannot] be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Concurring opinion of Mr. Justice Stewart, 427 U.S. at 375.

Lee County, Virginia, is a small rural county in the extreme southwestern portion of the State. Its people are engaged primarily in agriculture and coal mining. The county has a history of spirited partisan political battles. Unlike the rest of the South generally, the two major parties have been of relative equal strength over the years, with the Democrats winning one election and the Republicans the next.

In Virginia, one of the locally-elected offices is that of sheriff. The sheriff is a so-called "constitutional" officer, meaning that his election by the people is provided for in the Constitution of Virginia. Va. Const. art. VII §3 (1971). A sheriff holds office for a term of four years and in the November, 1975, general election, the incumbent sheriff, Curtis Flannery, a Republican, was opposed by Paul T. Harber, a former coal miner and Democrat. Sheriff Flannery's deputies worked for the reelection of their employer, and they

knew that they could expect not to be reappointed if Harber was elected since he would select his own deputies and would doubtless select from those who had supported his candidacy and in any event would not select his deputies from those who had opposed him. Sheriff Flannery's deputies had good reason to know of this practice since they in fact had obtained their jobs the same way when Sheriff Flannery had been elected. Sheriff Flannery had been elected four years previously and when he had assumed office he had hired a totally new set of deputies, retaining none of the deputies who had served under his predecessor, a Democrat.

After his election in November, Sheriff Harber gave out application forms to persons interested in becoming deputy sheriffs and out of some fifty applicants, selected ten deputies. Only one of Sheriff Flannery's deputies made formal application, although the District Court found as a matter of fact that they had "expressed interest" in continued employment but felt that making formal application would have been futile. Opinion of District Court, Appendix C to Petition, page 21a.

Sheriff Harber took office with his new deputies on January 1, 1976. On June 28, 1976, this Court decided *Elrod* v. *Burns*, and on September 22, 1976, Flannery's deputies filed suit against Sheriff Harber as well as the governing body of Lee County for "injunctive and declaratory relief" alleging that the failure to reappoint the plaintiffs as deputy sheriffs was a violation of the Constitution. They sought as relief "permanent reinstatement" in their "former employment position" as well as a sum of money equal to their back pay, and attorney's fees. The District Court

denied a preliminary injunction, but granted an expedited trial on the merits which took place January 26-28, 1977. The District Court dismissed the action as to the governing body of Lee County, but in an opinion filed April 21, 1977, held that Sheriff Harber's hiring of his own deputies violated the Constitution. Sheriff Harber was directed to hire the Flannery deputies as his own. Because the District Court found that Sheriff Harber had understandably relied on existing practice in all of his actions, it declined to direct him to pay the Flannery deputies back wages.

After an appeal by Sheriff Harber had been noted and a cross-appeal by the Flannery deputies to the decision of the District Court not to permit back wages, the Flannery deputies filed a second action against Lee County and its governing body seeking payment from the county treasury of the Flannery deputies' back wages. The District Court granted summary judgment in that case, on the basis of its earlier decision.

After oral argument, the Court of Appeals reversed, holding that even were *Elrod* v. *Burns* to be applied to the unique facts of this case, it should not be held to apply retroactively, in light of the guidelines laid down by this Court in *Cheveron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This case does not present a suitable occasion for the exercise of the Court's discretion to review. The Court of Appeals properly decided, based on the findings of the District Court, that retroactive application of the rule of *Elrod* v. *Burns* would not be

proper. That determination was made by correctly applying rules announced by this Court. The Court of Appeals below is the first such court to expressly determine this issue since *Elrod*, and there is thus no division among the circuits in this regard. Indeed, the issue has received scant attention in the lower federal courts. This is undoubtedly true because the issue is not a significant one and will not likely reoccur. The Court of Appeals' decision fairly and equitably balanced the benefits and hardships imposed by the application of any new constitutional rule.

I

The Court Of Appeals Correctly Determined That *Elrod* v. *Burns* Was Not To Be Applied Retroactively.

The Court of Appeals assumed, at least for the purposes of its decision, that the principles announced in *Elrod* v. *Burns*, 427 U.S. 347 (1976), applied to the facts of the case. Opinion of Court of Appeals, Appendix A to Petition, page 9a. It disagreed with the District Court, however, as to the issue of retroactivity.

In determining that issue the Court of Appeals looked to the guidelines of this Court as set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The Court of Appeals' primary disagreement with the district court was in its interpretation of whether the holding in *Elrod* was a substantial change in the law—the first of the criteria to be used in determining the retroactivity issue. See *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106. The Court of Appeals noted that the dissenters in *Elrod* in this Court had pointed out the break with prior law which it represented, with the

Chief Justice describing the holding as "run[ning] counter to longstanding practices that are part of the fabric of our democratic system ... " [427 U.S. at 375] and Mr. Justice Powell writing that the majority was holding unconstitutional "a practice as old as the Republic ... " [427 U.S. at 376].

In addition, the Court of Appeals held that past precedent in the Fourth Circuit was directly to the contrary of *Elrod.* In *Nunnery* v. *Barber,* 503 F.2d 1349 (4th Cir. 1974), *cert. denied,* 420 U.S. 1005 (1975), the Court of Appeals expressly upheld a patronage discharge against attack on constitutional grounds. The plaintiff in *Nunnery* was a former manager of a state operated liquor store in West Virginia who had been discharged from her employment for patronage reasons. The Court found no constitutional infirmity in that system. Judge Russell, speaking for Court of Appeals, reviewed the history of judicial consideration of patronage:

> The plaintiff's action represents a challenge to the "patronage" or "spoils" system of public employment. Such an attack is not novel. For more than a century, the system has been under attack. Generally the attack has been directed toward legislative action as the proper source of relief. And both federal and state governments have responded with civil service laws providing a merit system for public employment and giving public employees in certain classifications protection against discharge for patronage reasons .... When however, resort has been had by public employees to the courts for relief independently of the legislated civil service laws or regulations ... the claim has received scant consideration; and this has been true whether the claim was premised on the constitutional right of free speech, equal protection or due process.

503 F.2d at 1351.

The Court of Appeals announced its *Nunnery* decision on September 18, 1974, less than two years before *Elrod.* In between the two decisions, Sheriff Harber took office. As the Court of Appeals held, if it could not anticipate *Elrod,* it is not unreasonable that Sheriff Harber could not. Opinion of Court of Appeals, Appendix A to Petition, page 13a.

This holding by the Court of Appeals was not contrary to any finding of fact by the District Court. While there was no evidence that Sheriff Harber, a former coal miner, acted after an examination of case law, the District Court clearly found that his actions were consistent with his understanding of permissible political practice. Opinion of District Court, Appendix C to Petition, page 42a.

The petitioners' contention that *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977), required the Court of Appeals to defer to the Distict Court's decision on retroactivity, is without merit. In *Cathedral Academy,* this Court held only that it was a matter for the federal courts and not a state legislature to decide if the "unique flexibility of equity" permitted retrospective application of a constitutional rule. The Court of Appeals accepted the factual findings of the District Court and did not reject them. That it came to a different conclusion based upon those findings is not a ground for attack on its decision.

II

This Case Presents No Significant Issue For Review By The Court, In That There Has Been Little Attention Given To The Question And It Is Unlikely To Reoccur.

The question of the retroactive application of *Elrod* v. *Burns* has received little attention in the federal courts. Other than the two opinions below, only two other reported decisions, both by Pennsylvania district courts, have concerned themselves with the retroactive application of *Elrod.* Those two courts were divided on the issue. *Retail Clerks Ass'n* v. *Leonard,* 450 F.Supp. 663 (E.D. Pa. 1978); *Litwhiler* v. *Hidlay,* 429 F.Supp. 984 (M.D. Pa. 1977). In view of the fact that applicable statutes of limitation have or will shortly foreclose all but pending causes of action arising prior to *Elrod,* it is unlikely that the question will receive more attention in the future than it has in the past.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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